

# **LAW, POLITICS AND OBLIGATIONS IN THE UNIVERSAL PERIODIC REVIEW**

In Search of Effective Balance



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## ***ABBREVIATIONS AND ACRONYMS***

ALI	American Law Institute
CHR	Commission on Human Rights
ECOSOC	Economic and Social Council
HRC	Human Rights Council
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
ISHR	International Service for Human Rights
NHRI	National Human Rights Institution
NAM	Non-Aligned Movement
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner of Human Rights
OIC	Organization of the Islamic Conference
SUR	State under Review
UDHR	Universal Declaration of Human Rights
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WG	UPR Working Group
WTO	World Trade Organization

## 1 INTRODUCTION

Traditional international law as we know it originated in a closed political association among nation states. As in virtually any association, the participants formed and developed the system for themselves, in this case based on the concepts of sovereignty equality and consent. Persons, to the extent recognized, were merely appendages of each state. This paradigm of state sovereignty generally allows states to treat people under their jurisdiction as they wish. International human rights law creates a new paradigm, one where people, irrespective of their geographical location, enter the equation as rights holders possessing interests that states must recognize. Where interstate rights come from sovereignty, human rights come from dignity.

The United Nations (UN) was created in 1945 from the rubble of World War II, to maintain peace and “reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”<sup>1</sup> The UN was thus to “achieve international co-operation in [...] promoting and encouraging respect for human rights and for fundamental freedoms for all.”<sup>2</sup> The Commission on Human Rights (CHR) was established in 1946, as required, under the Economic and Social Council (ECOSOC),<sup>3</sup> and the movement to build a system of human rights law, through development of norms, duties and practices, started in earnest. American representative John Foster Dulles called the CHR the “soul” of the Charter.<sup>4</sup>

In the interstate system, each state has its own self-interest and level of development. All understand, however, that human rights may fundamentally conflict with sovereignty rights. The UN, a state created institution, allows retention of ultimate

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<sup>1</sup> UN Charter, Preamble.

<sup>2</sup> Id., Art. 1.3

<sup>3</sup> Id., Art. 68.

<sup>4</sup> Boyle (2009) p. 21, fn. 60.

state power, except in rare circumstances, in Article 2.7 of the UN Charter. It says, in effect, maintenance of international peace and security, under Chapter VII, is the only reason the UN may intervene in matters essentially within the domestic jurisdiction of any state. There may be no stronger principle in the UN than non-intervention, even if individuals are the ultimate beneficiaries of the UN and states themselves.

The human rights movement, grounded in dignity and personal autonomy,<sup>5</sup> had no option besides development within the state sovereignty paradigm that, by nature, saw it as a potential threat. That was the existing template. Finding constructive balance in the tension between the paradigms is perhaps the main characteristic affecting human rights law in the UN and internationally. Into this picture enters the Universal Periodic Review (UPR), to some the most tangible innovation in the reform process that created the Human Rights Council (HRC) in 2006, replacing the repudiated CHR.<sup>6</sup>

The UPR's function is to assess each state's fulfillment of its human rights obligations and commitments, based on objective and reliable information, in a manner that ensures universality of coverage and equal treatment with respect to all states.<sup>7</sup> It is to be cooperative, interactive, and fully involve the state under review (SUR), considering its capacity building needs. It should also complement, not duplicate, the work of treaty bodies. The HRC was otherwise responsible to develop the modalities of the new mechanism.

The UPR is a political process where states police themselves, in contrast to the quasi-legal character of the treaty bodies and special procedures. It was predictable that protection of state interests would predominate institution building of the UPR. With strong support from states that emphasize Article 2.7 to shield domestic matters from

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<sup>5</sup> Personal autonomy, used in the thesis, is associated to rights indispensable for dignity and free development of one's political, economic, social and cultural personality, without outside interference. Conceptually, it possesses the same nature as the self-determination that states, acting as fictitious persons, claim between themselves, but on the individual, micro level. CERD General Comment 21, para. 5, identifies this link to the exercise of such rights by every person.

<sup>6</sup> See Abede (2009) p.5.

<sup>7</sup> A/RES/60/251 (2006) para 5(e).

scrutiny,<sup>8</sup> the UPR is not empowered to take specific measures regarding implementation or noncompliance, but appears more like a venue to encourage implementation.<sup>9</sup> It relies on a state report as its starting point. Outcomes are predicated on consent of the State under Review (SUR). The mechanism, extremely abbreviated and inefficient, permits selectivity and is subject to abuse. A skeptic could see the UPR as merely illusory to create the impression of international concern while affording inadequate means to obtain compliance.

The first UPR session was held in April 2008. The process is in evolution. The initial cycle to review all states will not be completed until 2012. The HRC itself is to be re-evaluated in 2011 to perhaps elevate human rights alongside peace and security and development as the pillars of the UN structure.<sup>10</sup> Many issues will confront the UPR and its future direction. Can this political body achieve integrity and legitimacy? Can it improve trust in the face of diverse interests and cultures? Can it effectively balance between the interests of states and individuals to create realistic outcomes that make a difference on the ground?<sup>11</sup> Answers will reveal themselves in time. More immediate questions go to the UPR's procedure and ability to produce the "objective and reliable information" as the basis for its outcomes.<sup>12</sup> These include matters discussed below in the thesis such as openness, inclusion and efficiency, norms of obligations, effect of state conduct and the role of equity, meaning of "cooperation," and complementarity.

The research question considered is to determine how state obligations may serve to influence the UPR mechanism on a practical, progressive level to enhance human rights and interests. Undoubtedly, it cannot address all aspects of the UPR process. Though only an infant, the subject matter is large.<sup>13</sup> And since the UPR has not completed a cycle,

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<sup>8</sup> Some of these states formerly maintained that Article 2.7 should not preclude intervention.

<sup>9</sup> Abede (2009) p. 31.

<sup>10</sup> A/RES/60/251 (2006) para. 16.

<sup>11</sup> A/HRC/5/1 (2007) para. 4(a).

<sup>12</sup> A/RES/60/251 (2006) para. 5(e).

<sup>13</sup> This thesis significantly relies on several sources with greater proximity to daily events in Geneva for examples regarding issues during institution building and proceedings of the UPR. These include ISHR

and is subject to review after the initial cycle,<sup>14</sup> it seems unrealistic to make firm conclusions about worth, as compared to understanding patterns of interplay between different actors and interests. There is merit, however, to examine the development of human rights law and state obligations to ascertain categories of interests for state responsibilities which, when observed, can influence and improve state conduct in the UPR process and, on a larger level, its domestic processes. In the course of writing, emphasis was made to see the UPR in its current state, not forgetting the dynamic aspect of its evolution in the glare of UN politics.

The thesis uses a qualitative approach that integrates legal, political and historical perspectives, as each affects both human rights and international law. Chapter 2 looks at the background of human rights at the UN leading to the UPR's creation. Chapter 3 describes the UPR mechanism and procedure, and discusses some significant contextual politico-legal issues encountered in the institution building process. In Chapter 4, there is an examination of legal sources of state obligations in human rights applicable in the UPR, including the manner these obligations develop. Then, Chapter 5 identifies, in the context of continuing issues of dispute between members at the HRC and UN, generally, core categories of interests from these legal obligations by which the UPR mechanism, and the performance of all states within, may be analyzed. In Chapter 6, impressions on the mechanism and potential for improvement are provided, based primarily on the criteria established and information analyzed.

A recent examination found the UPR was already overwhelmingly political and did not provide for experts or civil society to adequately participate.<sup>15</sup> Rather, states provide the primary information, engage in the interactive dialogue, and consolidate the report itself.<sup>16</sup> Although the UPR is, to date, much less effective than it could have been in terms

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(2009) pp. 37-50 and (2010) pp. 33-41; Sweeney (2009) pp. 203-223; Abede (2009) pp. 1-35; and Abraham (2007) pp. 234-241.

<sup>14</sup> Id., para. 14, fn a.

<sup>15</sup> See UN Watch (2009).

<sup>16</sup> Abedi (2009) p. 8.



of participation, and still subject to abuse and manipulation in the political power struggle inherent at the UN, it nevertheless contains promising opportunities for moving human rights forward that did not previously exist.

Ultimately, the UPR will only be as good as the states that use it. When states adopt and utilize good practices to develop the mechanism as a legitimate means to help states move purposefully toward fulfillment of their national and international human rights obligations and responsibilities, rather than a shield against scrutiny into matters of domestic jurisdiction, other states may act similarly. In such case, the UPR process can become a true forum for deliberation and discourse that furthers commitments, assistance, and implementation of the rights set forth in the UDHR for those on the ground and their progeny.

## **2 HUMAN RIGHTS AT THE UN AND THE UPR**

### **2.1 THE COMMISSION AND UDHR: A SOVEREIGN WORLD TRANSFORMED**

The UN was an effort by mostly powerful states to maintain international peace and security using an intergovernmental mechanism, while recognizing human rights and development were indispensable. Boyle says the original idea was to address human rights issues at the level of principle, but deny victims redress that might offend the principle of state sovereignty.<sup>17</sup> Thus, Article 68 mandated the Economic and Social Council (ECOSOC) to set up a commission “for the promotion of human rights,” but the most powerful states inserted Article 2.7, in part, to allay concerns over interventions in their internal human rights policies.<sup>18</sup>

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<sup>17</sup> Boyle (2009) pp. 15-16.

<sup>18</sup> Ibid. Also Lauren (2007) pp. 312-313.

A “nuclear” Commission was formed,<sup>19</sup> headed by Eleanor Roosevelt, and convened in February 1946 to consider the new CHR and its mandate. Of all obstacles, they and others saw sovereignty as most problematic.<sup>20</sup> A US diplomat once explained, “The essence of sovereignty is the absence of responsibility.”<sup>21</sup> Herbert Evatt, foreign minister of Australia, remarked, “Every country represented ... has its own internal problems, its own vital spheres of domestic policy in which it cannot, without forfeiting its very existence as a state, permit external intervention.”<sup>22</sup> Sovereignty allowed national leaders to declare immunity from international efforts regarding the responsibility for internal human rights violations. This illustrates the environment that human rights law would enter. Interestingly, the UPR faces much the same issues.

The nuclear Commission wanted the CHR be an agency of implementation entrusted to watch over general “observance of human rights.”<sup>23</sup> Concerning membership, it generally believed, as ECOSOC members were elected by and represented governments, the CHR, appointed by ECOSOC, should consist of highly qualified persons to serve as non-governmental representatives.<sup>24</sup> With experts, the CHR would have greater independence and integrity to challenge governments and actively serve to protect victims of human rights abuses. Seen by states as too ambitious, threatening to sovereignty and domestic jurisdiction, the nuclear proposal was decisively rejected by ECOSOC.<sup>25</sup> The CHR would be an intergovernmental organization for discussion, not enforcement.

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<sup>19</sup> See Lempinen (2010) p. 6.

<sup>20</sup> Lauren (2007) p. 311.

<sup>21</sup> Former Secretary of State Robert Lansing. See Lauren (2007) p. 311, fn. 17.

<sup>22</sup> Lauren (2007) p. 313.

<sup>23</sup> Gutter (2006) p. 41, fn. 93.

<sup>24</sup> Report of the Commission (1946), E/38 (21 June 1946) pp. 230–231. See Alston (2006) p. 189. The Soviets demanded that all members of the CHR and Sub-Commissions be government representatives. See Lauren (2006) p. 314.

<sup>25</sup> ESC Res 9 (II), UN ESCOR, 2nd sess, Annex 14, UN Doc E/RES/9 (II) (21 June 1946). See Alston (2006) p. 190.

Philip Alston believes an opportunity was missed by the nuclear Commission to specify why it supported independent experts.<sup>26</sup> It was unrealistic to expect governmental representatives to be critical of their states, and generally they possessed insufficient technical knowledge to address the complexity of issues. ECOSOC could have reserved real decision-making authority and used an expert CHR to generate ideas, facilitate multiple interests.<sup>27</sup> Lacking independent experts as members, however, the states condemned themselves to debates over membership that helped in the CHR's demise.<sup>28</sup> Experts on the CHR would have also precluded what occurred, membership by governments thought responsible for grave violations, and likely helped the CHR from becoming "governmentalised."<sup>29</sup>

Politics also forced the CHR early on to make "a critical declaration of impotence"<sup>30</sup> when it came to individual violations and petitions.<sup>31</sup> Resistance came from the major powers like the US, USSR, and UK.<sup>32</sup> If individuals could circumvent their governments to seek redress from the international community, it could challenge the primacy of national sovereignty and increase risks of outside interference into states' internal affairs, at home or in colonies. Thus, the CHR "recognized" that it had "no power to take any action with regard to any complaints concerning human rights."<sup>33</sup> In Tolley's words, "The Commission thus repudiated its powers to investigate and to make recommendations, beginning a twenty year period of self-denial."<sup>34</sup>

Tasked with responsibility to draft an "international bill of rights," the CHR set to develop a legal framework of norms. Once evident, however, that binding obligations or

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<sup>26</sup> Alston (2006) pp. 189-190.

<sup>27</sup> Ibid.

<sup>28</sup> Id., p. 190.

<sup>29</sup> Ibid. Also Lempinen (2005) pp. 13-18.

<sup>30</sup> Tolley (1987) p. 16.

<sup>31</sup> Id., pp. 16-17. Also Lauren (2007) at pp. 314-315 and Gutter (2007) p. 96.

<sup>32</sup> Tolley (1987) p. 17. Also Boyle (2009) p. 24.

<sup>33</sup> Commission on Human Rights Report of the First Session, E/259 (1947); and ECOSOC Res. 75(V), 5 August 1947.

<sup>34</sup> Tolley (1987) p. 17.

enforcement measures might result, powerful states mounted serious resistance. The Soviets warned of crossing the border between international and internal law that divides the inter-relationships of governments, while the US sought to focus on the “safer ground” of an unenforceable declaration of principles that did not “involve any [legal] commitments by this Government.”<sup>35</sup>

The UN adopted the UDHR on 10 December 1948.<sup>36</sup> The list of rights were not, according to Eide, universal in terms of recognition, enforcement or enjoyment, but a future-oriented project to be pursued by deliberate action by committed actors, to push and to persuade where they could, “... by teaching and education to promote respect for these rights and freedoms and by progressive measures to secure their universal recognition and observance.”<sup>37</sup> This involves efforts, as seen in Section 4.1.3. to respect, protect and fulfill. However, until absorbed into positive, national law and/or made justiciable in the practice of courts, human rights could not be considered “law.”<sup>38</sup>

The UDHR has been called the *magna carta* for mankind.<sup>39</sup> Some claim it has legal force.<sup>40</sup> It served as the foundation of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), hereafter (Covenants)<sup>41</sup> and inspired a revolution in human rights, internationally, regionally, and at the domestic level. John Humphreys, who participated in the early proceedings, noted that creating global protection for human rights “represents a radical departure from traditional thinking and practice.... We are in effect asking States to submit to international supervision their relationship with their own citizens, something which has been traditionally regarded as an absolute prerogative of

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<sup>35</sup> Lauren (2007) p. 316, fns. 32-33.

<sup>36</sup> G.A. Res. 217, 3 GAOR UN Doc at 71 (10 December 1948).

<sup>37</sup> Eide (2007) pp. 139-140.

<sup>38</sup> *Id.*, p. 140.

<sup>39</sup> UN Watch (2008) p. 1.

<sup>40</sup> See Section 3.3.

<sup>41</sup> A/RES/2200 (XXI) (16 December 1966) pp. 49-60. The UDHR, Covenants, and the ICCPR Optional Protocol make up the International Bill of Human Rights.

national sovereignty.”<sup>42</sup> But as matters on the ground developed and UN membership changed, the national sovereignty prerogative would come under increasing attack.

## 2.2 A PREDECESSOR TO THE UPR?

As early as 1950, France proposed a periodic reporting system tied to the UDHR.<sup>43</sup> The US was instrumental in a 1956 system of country self-reporting on human rights.<sup>44</sup> The American proposal called for submission of voluntarily reports to address “results achieved and difficulties encountered ... in the promotion and development of human rights.”<sup>45</sup> After summary and analysis by the Secretary-General and specialized agencies, using information from their members and appropriate comments, a committee of member states would conduct a review.<sup>46</sup> The voluntary process was underutilized and abolished in 1980. And during this time, since the CHR only focused on normative matters of treaty development, scrutiny of states’ compliance with international human rights norms was virtually nonexistent.

Alston points to three significant decisions related to the 1956 self-reporting mechanism that affect UN reporting procedures thereafter.<sup>47</sup> First, the CHR decided to seek information only on “general developments and progress achieved” instead of “results achieved and difficulties encountered” as originally proposed in the draft. Although the Covenants adopted the more expansive approach, state reports downplay or ignore difficulties.<sup>48</sup>

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<sup>42</sup> Lauren (2007) p. 319.

<sup>43</sup> Alston (2006) p. 207, fn. 112.

<sup>44</sup> ECOSOC Res. 624B (XXII) (1 August 1956). See Alston (1992) pp. 132-133 and (2006) pp. 207-208 about the 1953 Bricker Amendment and subsequent US action program.

<sup>45</sup> United States of America: Revised Draft Resolution on Annual Reports in Report of the Ninth Session of the Commission on Human Rights (1953) p. 32, para. 263. See also Alston (2006) p. 208, fn. 117.

<sup>46</sup> Ibid.

<sup>47</sup> Alston (2006) pp. 211-212.

<sup>48</sup> Id., at p. 211.

Second, without dissent from any CHR member, a change was made whereby the Secretary-General would only prepare a “brief summary” of the report, not “a brief summary *and analysis*.” Alston continues:

Few decisions by the Commission have been as conscientiously adhered to as this one has been. Even 50 years later, not a single UN human rights reporting system provides for the Secretariat to undertake a detailed technical analysis of states’ reports prior to their consideration by the relevant political or expert body concerned — a practice long followed by the ILO and the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’).<sup>49</sup>

Third, with regard to “comments and conclusions ... it deems appropriate,” the final version added “recommendations,” but only if they were “of an objective and general” nature. In other words, not country specific and/or dealing with particular situations.<sup>50</sup> These limitations, inherited by all UN reporting procedures, influenced institution building in the HRC, and continue to do so in the UPR.

After the reporting system was abandoned, the Secretary-General described it as “obsolete, ineffective or of marginal usefulness.”<sup>51</sup> Alston nonetheless saw important precedent. It showed the UN had moved substantially from the position that the UDHR was not legally binding, that state conduct could not be subject to formal review, and that a reporting procedure would not interfere with domestic affairs of states.<sup>52</sup> Lack of success, however, was not surprising. Although the UN Charter called for states, through joint and separate action and cooperation, to promote human rights,<sup>53</sup> intergovernmental forces of state sovereignty remained the frame of reference.

## 2.3 EXPANDING INTO VIOLATIONS

By 1966, when the Covenants were adopted, the UN had changed significantly due to new membership and effects from colonialism. Conflict was also shifting from

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<sup>49</sup> Id., at p. 212.

<sup>50</sup> Ibid.

<sup>51</sup> Gaer (2007) p. 116.

<sup>52</sup> Alston (2006) pp. 208-209.

<sup>53</sup> UN Charter, Articles 1.3, 55 and 56.

international to internal. Conditions on the ground caused the status quo to shift. Space does not afford ample opportunity to discussion how the CHR engaged human rights violations, but one may note that new, independent, developing countries first acted to diminish the sovereignty principle of Article 2.7, in relation to apartheid in South Africa. Under Resolution 1235,<sup>54</sup> ECOSOC authorized the CHR to publically examine information about “gross violations” of human rights and fundamental freedoms from “situations” that revealed a consistent pattern.<sup>55</sup>

The 1235 procedure permitted scrutiny “in all countries,”<sup>56</sup> squarely rejecting the safe haven of nonintervention formerly instilled by the major powers. The CHR was enabled to respond to country-specific and thematic situations in a framework that became known as “special procedures.”<sup>57</sup> In 1975, after the Pinochet coup, Chile became the first state scrutinized solely on the basis of human rights. Special procedures permitted the UN, through the CHR, to assert itself beyond the level of principle. It was recognition, according to Boyle, of an underlying obligation not to violate human rights, to cooperate and act in efforts to address and enhance them.<sup>58</sup>

ECOSOC Resolution 1503<sup>59</sup> in 1970 authorized CHR review of individual, confidential communications that appeared to reveal a consistent pattern of gross and reliably attested violations, but only with express consent and constant co-operation with the state concerned under conditions determined by agreement.<sup>60</sup> Notwithstanding, through diplomatic measures, powerful, mostly developed states, where problems of

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<sup>54</sup> ECOSOC Res. 1235 (XLII) (6 June 1967).

<sup>55</sup> *Id.*, at paras. 1, 2 and 3. See also Gutter (2007) p. 97.

<sup>56</sup> See para 1.

<sup>57</sup> Yeboah (2008) p. 79.

<sup>58</sup> Boyle (2009) p. 16.

<sup>59</sup> ECOSOC Res. 1503(XLVIII) (27 May 1970).

<sup>60</sup> *Id.*, para. 6(b). Addition restrictions were imposed, such as the exhaustion of domestic remedies and exclusivity of the matter before the Committee.

inequality and discrimination often remained,<sup>61</sup> successfully avoided meaningful action against them or their allies.

Conversely, developing states, where internal conflict and violations were more likely, became vulnerable as targets. Some that initially supported the rationale behind special procedures resisted when eyes turned to their internal power struggles, calling for tolerance and non-confrontation, often along North-South lines.<sup>62</sup> Equatorial Guinea was the first escalation from the 1503 communication process to the public scrutiny of 1235, purely in a human rights context, and when Argentina flagrantly abused the confidentiality rule of 1503, it set in motion a process to create, in 1980, the first “theme” under the Working Group on Disappearances.<sup>63</sup>

Special procedures provided deterrent value to compel state compliance or be placed in a position of having to defend its record. It helped create balance and a larger voice for dignity interests before the CHR. No longer could sovereignty automatically render states immune or unaccountable. Despite the failings that followed, the CHR, according to Lauren, was the premier political forum to confront governments over reports of serious violations, to name and shame them, and to draw attention to the need for corrective action to stand up and protect victims of human rights abuses.<sup>64</sup>

## 2.4 BREAKDOWN, REFORM AND THE UPR

A new political majority from Asia and Africa emerged in the UN, influencing almost every activity, and regional groups and political caucuses, such as the Non-Aligned Movement (NAM), took a greater role.<sup>65</sup> Internal self-determination and racial discrimination could justify intrusion into a state’s domestic affairs. Assisted by experts

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<sup>61</sup> A clear example was the US and its racial problems.

<sup>62</sup> See Scheipers (2007) pp. 232-237.

<sup>63</sup> Gutter (2006) pp. 68-69.

<sup>64</sup> Lauren (2007) p. 325.

<sup>65</sup> Boyle (2009) p. 26.



on the Sub-Commission on the Promotion and Protection of Human Rights, special procedures mandates grew rapidly starting in the 1990s.<sup>66</sup>

When the procedures focused to a large degree on developing states, the importance of the CHR was cause for authoritarian regimes to campaign within their respective regional blocs to seek membership.<sup>67</sup> Members sat as both judges and defendants.<sup>68</sup> Because the UN Charter was ambiguous, giving ammunition to all sides, states could use sovereignty as a shield to obscure human rights records. Abusers could hide behind the same veil the most powerful once created to preserve their political prerogatives. States engaged in bloc voting, quashed discussion, and resisted country specific mandates as an infringement. As Buhrer evidenced for Reporters Without Borders, almost all members engaged in double standards and poor conduct, looking at others while ignoring themselves or their friends, revealing the continued dominance of politics.<sup>69</sup> The CHR became a breeding ground for disputes over membership, procedures and “politicization” that, *inter alia*, grew to finally destroy it as an effective body.

In December 2004, it was acknowledged that some states sought membership “not to strengthen human rights but to protect themselves against criticism or to criticize others”<sup>70</sup> and a new body was recommended. Kofi Annan agreed “the Commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole.”<sup>71</sup> An HRC would be “a fresh start. . . . Its main task would be to evaluate the fulfilment by all states of all their human rights obligations.”<sup>72</sup> This would help elevate

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<sup>66</sup> From 1990-1994, 7 new thematic procedures and 11 country-specific procedures were created. The Cold War effect also ended. See Gutter (2007) pp. 102-103.

<sup>67</sup> Lauren (2007) p. 322.

<sup>68</sup> *Id.*, p. 327.

<sup>69</sup> See Buhrer (2003).

<sup>70</sup> Report of the High-Level Panel on Threats, Challenges and Changes. A/59/565 (2004).

<sup>71</sup> Report of the Secretary-General. In larger freedom: towards development, security and human rights for all. A/59/2005 (2005).

<sup>72</sup> *Ibid.*

human rights to primacy with security and development at the UN, as they are interconnected and cannot be enjoyed unless human rights are respected.<sup>73</sup>

The World Summit outcome in September 2005 resolved to create the HRC to address situations of violations of human rights, including gross and systematic violations, among other things.<sup>74</sup> Details were deferred to the General Assembly where, on 15 March 2006, Resolution 60/251 was adopted, creating the HRC and the UPR therein.<sup>75</sup>

### **3 THE UPR AS A MECHANISM**

The UPR grew from the need to bring a sense of order back to UN human rights process, and promote enhanced dialogue and broadened understanding among civilizations, cultures and religions while recognizing the importance of universality, objectivity and non-selectivity in the consideration of human rights issues and elimination of double standards and politicization.<sup>76</sup> The UPR looks to the SUR's fulfillment of its human rights obligations and commitments and ensure universality of coverage and equal treatment, be cooperative, and complement, not duplicate, the work of treaty bodies.<sup>77</sup>

#### **3.1 UPR NUTS & BOLTS**

Unlike the CHR that reported to ECOSOC, the HRC reports to the General Assembly. Membership remains geographically constituted between the five regional groups, reduced from 53 to 47, but there is less balance than before.<sup>78</sup>

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<sup>73</sup> Id. at para 17. See also Boyle (2009) p. 20.

<sup>74</sup> World Summit Outcome. A/RES/60/1 (2005) paras. 157-159.

<sup>75</sup> A/RES/60/251 (2006) para. 5(e).

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Abraham (2007) p. 6. The Western and Latin American groups lost six seats. The High Level Panel had suggested universal membership. See A/59/565 (2004) para. 285.

Elections to the HRC are by majority of the General Assembly, not the rubber stamp process of ECOSOC. Candidate contributions, voluntary pledges and commitments are factors to be taken into account in the voting. Such voluntary undertakings, discussed in Section 4.3, arguably constitute binding obligations, for the record, and create the inference of intent to comply that places the burden on the state to offer explanation when an issue of noncompliance may rise. Pledges can be a particular focus when a member's UPR occurs, and the subject matter a basis for recommendations and follow up.

HRC Resolution 5/1<sup>79</sup> sets forth the essential framework of the UPR mechanism developed from the institution building process prescribed by the General Assembly. The UPR will cover all UN states each four years. The main review is carried out by a UPR Working Group (WG) of all 47 HRC members in an interactive dialogue. The WG prepares a report, including recommendations, then considered in the HRC Plenary, and a final outcome is adopted.

Information for the WG comes from three primary sources. The SUR sets the table with a report of its choice, not longer than 20 pages.<sup>80</sup> General guidelines<sup>81</sup> suggest references to obligations in the basis of the review and their implementation, identification of achievements, best practices, challenges and constraints, and description of the consultation process and methodology used at the national level. However, reporting obligations should not be burdensome. Nor is it required to address pledges from a member's candidacy for membership. The OHCHR produces the two other sources, a summary of information from treaty bodies, special procedures and other relevant official UN documents, not exceeding 10 pages; and a summary of credible and reliable information provided by relevant stakeholders like NGOs, national HRs institutions, and HRs defenders, not exceeding 10 pages.<sup>82</sup>

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<sup>79</sup> A/HRC/5/1 (18 June 2007).

<sup>80</sup> Id., para 15.

<sup>81</sup> A/HRC/DEC/6/102 (27 September 2007).

<sup>82</sup> A/HRC/5/1 (2007) para 15.

The UPR process is facilitated by a “troika” composed of three rapporteurs, randomly appointed by the HRC. With support from the OHCHR, it prepares the WG to hold the interactive dialogue, lasting only three (3) hours, including presentation by the SUR, comments, questions and recommendations from other states, and replies. States have no obligation to respond to questions put to them during examination.<sup>83</sup> Here, other relevant stakeholders may only observe. In conjunction with the SUR, the troika completes the WG report. The SUR is expected to examine all recommendations and identify those that enjoy its support.<sup>84</sup> Other recommendations are noted in the WG report, even those rejected, along with SUR comments.

The HRC Plenary is 60 minutes. Other relevant stakeholders may now directly participate with “general comments,” an area of controversy discussed in Sections 3.5 and 5.3.2. The mechanism ends with adoption by the HRC of an outcome document that contains, *inter alia*, recommendations for implementation by the SUR and, as appropriate, other stakeholders.<sup>85</sup> The SUR, and others, are expected to follow up on the recommendations that enjoy its support as well as on voluntary commitments and pledges.<sup>86</sup> The nature of subsequent reviews and follow-up, if any, remains unknown.

### 3.2 BUILDING THE UPR

To assist in creation of the UPR, Ambassador Mohammed Loulichki of Morocco was appointed to facilitate an intersessional, intergovernmental working group.<sup>87</sup> Predictably, states with most affection for Article 2.7, numerically superior, successfully worked to take control over the process, using old paradigm calls for “consensus” and

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<sup>83</sup> In comparison, neglecting a treaty body's questions may result in more pointed concluding observations, but UPR recommendations, already made, leaves no incentive to answer and affect the outcome. See Sweeney (2009) p. 211.

<sup>84</sup> A/HCR/PRST/8/1 (2008), para. 10.

<sup>85</sup> A/HRC/5/1 (2007) para 33. See Callejon (2008) p. 334-335.

<sup>86</sup> A/HCR/PRST/8/1 (2008), para. 10.

<sup>87</sup> A/HRC/DEC/1/103 (2006).

“cooperation” that work to restrict effective scrutiny of conduct, transparency and participation, that states wanting a more humanized approach could not offset.<sup>88</sup>

Despite looking at the procedures of existing mechanisms for periodic review,<sup>89</sup> consensus developed that the SUR would supply a report and presentation as a starting point of interaction. Alston questioned the overall benefit of a review process that depends on an initial state report, a 1950’s relic used by treaty bodies because they so require, yet rejected in most other areas of international monitoring where the starting point is not information by the actor being monitored.<sup>90</sup> In an instance of *déjà vu*,<sup>91</sup> “analysis” is barred from OHCHR compilations.<sup>92</sup> Participation of non-state actors, such as experts and civil society, was also limited, particularly compared to their roles at the CHR.<sup>93</sup>

The core of the facilitator’s non-paper of 27 April 2007<sup>94</sup> became the final institution-building text, Resolution 5/1, but the institution building phase did not resolve important issues.<sup>95</sup> Days before the first WG hearing, Egypt/African Group, Palestine/Arab Group, and Pakistan/Organization of the Islamic Conference (OIC) raised concerns in a non-paper over matters like webcasting, publishing on the internet, and format of the WG report.<sup>96</sup> On the morning of the first session, the President presented a final statement on modalities and practices<sup>97</sup> that did not solve everything, but formed a basis to proceed, and permitted webcasting, a huge step for transparency in the

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<sup>88</sup> See Gaer (2007) pp. 128-133.

<sup>89</sup> A/HRC/DEC/1/103 (2006) para. 5.

<sup>90</sup> Alston (2006) p. 214.

<sup>91</sup> See Section 2.2, above.

<sup>92</sup> Abraham (2007) p. 38.

<sup>93</sup> See Lempinen (2010) pp. 26-27.

<sup>94</sup> See Loulichki (2007).

<sup>95</sup> Perhaps facilitation was largely uncontentious because the UPR was seen as key to recovery of the CHR’s lost credibility. See Sweeney (2009) p. 205.

<sup>96</sup> Late submission led some to question the ‘transparency’ and intentions of the sponsors. ISHR (2009) p. 38.

<sup>97</sup> A/HCR/PRST/8/1 (2008).

intergovernmental process. To open a window into the UPR and interests that push it in different directions, some issues presented in building the UPR are discussed below.

### 3.3 NATURE AND BASIS OF THE REVIEW

Secretary-General Annan originally proposed that the HRC would undertake a “peer review” of all states, but “periodic” was adopted by the general Assembly.<sup>98</sup> The mechanism is each. A broader issue is how to keep it from becoming occasional and irrelevant, or worse, where genuine human rights dialogue is replaced by theater that hinders progress. States are mostly free to be heard, but not obliged to hear, respond to questions or consent to any recommendations. The UPR mechanism should be cooperative, based fulfillment of obligations, not a means to criticize failure to do so. Without sufficient trust in the system, however, states keep firm control, illustrated by the reporting system adopted, that most other areas of international monitoring reject.

The control issue is further evident in matters of participation. Resolution 5/1 calls on the UPR to ensure participation of all relevant stakeholders.<sup>99</sup> Looking again to the CHR periodic review, Alston advocated a major role in the UPR for OHCHR and experts, as this would help improve the recommendation system and build credibility in the new political process.<sup>100</sup> States decided otherwise, to keep the UPR solely intergovernmental, use a neutered troika approach, and allow less direct participation from experts and civil society. Nonetheless, the UPR mandate is wide, with opportunities for states to use best practices and exercise political will. It provides a focus point for issues and sources of information to gather in the public domain and, perhaps, will assist other human rights mechanisms.

An ongoing matter concerns which human rights obligations and commitments are included in the scope of the review, and the variation of treatment between states with

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<sup>98</sup> A/59/2005 (2005) Add.1, para. 6.

<sup>99</sup> A/HRC/5/1. (2007), paras. 3(m) and 4(f).

<sup>100</sup> Alston (2006) p. 214.

different obligations.<sup>101</sup> Consistent with the Article 2.7, some wanted to exclude examination about treaties not ratified. Singapore said that since states “are neither obligated to fulfil [...] nor have made a commitment to do so [...] the review should examine broader obligations under the Universal Declaration of Human Rights as well as commitments made by individual States, such as the voluntary pledges made while seeking membership.”<sup>102</sup> Gaer sees irony when states want no scrutiny over unratified treaties, yet favor examination on the full range of issues in the UDHR that appears to overlap the treaties and is broader in application.<sup>103</sup>

Resolution 5/1 provides that the basis of the UPR review is the UN Charter, the UDHR, human rights instruments to which the SUR is party, and voluntary pledges and commitments, including those undertaken when presenting candidatures for election to the HRC. The review shall also take into account applicable international humanitarian law, which, since many violations result from internal conflict, may have a significant effect future UPRs, especially vis-à-vis development from customary law.

A right need not be justiciable or treaty based to be the subject of inquiry, even if states disagree. For example, on the issue of sexual orientation, Egypt claimed a matter could only be within the basis of review if a state had made a voluntary pledge and commitment.<sup>104</sup> When the issue resurfaced, Egypt objected to “certain states imposing controversial subjects on others.”<sup>105</sup> Such allegations, to be understood, may require clarification on the record, in relation to the right to be protected. This would increase transparency and communication about differing values regarding issues of current concern. Narrow confines of scrutiny decrease chances for productive discourse, understanding and consensus.

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<sup>101</sup> See Gaer (2007) pp. 125-126.

<sup>102</sup> Ibid.

<sup>103</sup> Id., p.126.

<sup>104</sup> ISHR (2009) p. 41.

<sup>105</sup> Gamaleldin statement, UPR WG for Botswana, 1 Dec. 2008.

### 3.4 RECOMMENDATIONS

Recommendations go to compliance and follow up. According to Resolution 5/1, recommendations shall be included in the outcome report.<sup>106</sup> Implementation, however, can be problematic if states cannot agree on what is a recommendation. Some SURs have challenged that content of recommendations must be within the “framework of universally recognised human rights.”<sup>107</sup> The WG decided it does not endorse recommendations, but factually reflects what occurs during the interactive dialogue.<sup>108</sup> Thus, all recommendations from individual states, even if rejected, are in the outcome report.

Although a formal WG recommendation, compared a state recommendation, would carry more institutional weight, recommendations are probably unenforceable. Also, if WG approval was required, negotiations to reach consensus might water down recommendations or produce nothing. Now there is an avenue to inject detailed, specific recommendations in controversial areas into the sunlight, venturing as far as a state is willing to act, to open scrutiny at the next UPR.<sup>109</sup>

Differences about what constitutes international human rights law and obligations, for purposes of recommendations, will continue. Civil society and stakeholders may influence these issues by a variety of means, particularly suggesting recommendations for utilization, based on their specialized knowledge of situations, and sharing information to assist states and other stakeholders at the domestic and international levels, among other things.

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<sup>106</sup> Para. 32.

<sup>107</sup> Pakistan. See ISHR (2008) p. 45. Resolved by Pakistan offering its opinion of what it considered to be fact, rather than make the factual conclusion itself.

<sup>108</sup> A/HCR/PRST/8/1 (2008) para. 8.

<sup>109</sup> A/HRC/5/1 (2007) para. 34.



### 3.5 OUTCOME AND FOLLOW-UP

The Plenary for adoption of the WG report lasts 60 minutes. The SUR, other states, and stakeholders receive 20 minutes each.<sup>110</sup> The SUR may make voluntary pledges/commitments, reply to questions not adequately answered previously, and reiterate rejected recommendations.<sup>111</sup> Comments and questions may be presented by member and observer states. Other stakeholders may provide “general comments,”<sup>112</sup> a contentious topic. The relationship between the WG and Plenary was intensely debated.<sup>113</sup> Bifurcation allows more focus, efficiency and separation between review process and the process of adoption.<sup>114</sup> But states in the African Group were concerned about a “double review” and wanted to limit plenary discussion, particularly general comments by civil society, strictly to the WG process and outcome document, nothing new.<sup>115</sup> The Western Group preferred to look at issues not sufficiently addressed in the WG, with greater latitude for NGOs. In the end, the President’s attempt to clarify<sup>116</sup> only caused greater confusion.<sup>117</sup>

Since the UPR is cooperative, the SUR is to be fully involved in the outcome.<sup>118</sup> It cannot eliminate recommendations in the outcome document,<sup>119</sup> which are a main focus for the subsequent review,<sup>120</sup> but accepts only those it chooses. The outcome may include voluntary commitments and pledges, but the status of election pledges is not clear.<sup>121</sup> The outcome may also assess the situation of human rights in the reviewed country, positive developments and challenges, identification of best practices, provision

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<sup>110</sup> A/HCR/PRST/8/1 (2008) para. 16.

<sup>111</sup> See Abede (2009) pp. 17-18 for examples.

<sup>112</sup> A/HRC/5/1 (2007) para. 31.

<sup>113</sup> See Abede (2009) pp. 17-19.

<sup>114</sup> Abraham (2007) pp. 35-36.

<sup>115</sup> See Abede (2009) pp. 17-19.

<sup>116</sup> A/HCR/PRST/8/1 (2008) para. 6.

<sup>117</sup> See Sweeney (2009) p.216.

<sup>118</sup> A/HRC/5/1 (2007) para. 33.

<sup>119</sup> Id., paras. 27 and 28.

<sup>120</sup> Id., para. 34.

<sup>121</sup> Id., para 27(e).

of technical assistance, and proposals for cooperation to promote and protect human rights.<sup>122</sup>

With respect to follow-up, the HRC reserves authority to decide. Resolution 5/1 says that the outcome report “should be implemented,” largely to be determined in the subsequent review cycle, while any specific action for “persistent non-cooperation” with the mechanism is conditioned on “exhaustion of all efforts.”<sup>123</sup> With such vague criteria, it seems fair to wonder whether such authority to act will ever be utilized, or agreed upon, particularly when recommendations are often subject to vagueness and ambiguity, too.

#### **4 HUMAN RIGHTS LAW AND THE UPR**

The Preamble of Resolution 60/251 provides that, while national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, more importantly, “all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.” They have further “responsibilities, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind.”

Concerning obligations at the UN, General Assembly Resolution 32/130 sets forth the precept that all human rights are inalienable, indivisible and interdependent, whether civil, political, economic, social and/or cultural, and that equal attention and urgent consideration should be given to their implementation, promotion and protection.<sup>124</sup> Questions of human rights should be examined globally and consider both the overall context and health of the society and the need for promotion of full human dignity of the

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<sup>122</sup> Id., para. 27.

<sup>123</sup> Id., paras. 37 and 38.

<sup>124</sup> A/RES/32/130 (1977), paras. 1(a) and (c).

person, looking to the experience and contribution of both developed and developing countries.<sup>125</sup>

All work within the United Nations system with respect to human rights questions should take Resolution 32/130 into account.<sup>126</sup> Donnelly sees it as a guide.<sup>127</sup> It establishes a process obligation within UN human rights mechanisms that extends to the UPR and state conduct therein, resting on a pillar of good faith and friendly relations to promote international peace and security.

The Vienna Declaration and Programme of Action<sup>128</sup> affirmed the principle in Resolution 32/130. States and others regularly pledge allegiance to such notions, in treaties and elsewhere, then forget them in practice at the national or international levels, where the politics of self-interest clouds the picture. Among reasons states offer for noncompliance is a claim that precise content of many rights are vague and permit scrutiny that infringes on state rights of self-determination. Of course, dignity interests may do exactly that, conflict with state sovereignty.

The sources of human rights law applicable in the UPR context help states understand the spirit and extent of obligations, to better perform their roles and responsibilities therein. Principles of human rights generally enter the body of international law through the channels cited by Article 38.1 of the ICJ Statute: treaties, customary law, and general principles of law common to the major legal systems of the world. Unlike traditional international law, however, where norms gradually develop through consensus and bilateral practice between states, principles based on human dignity are less encumbered. Legal obligations in human rights may arise not only from traditional means, but through undertakings or, arguably, conduct that, in equity, creates

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<sup>125</sup> Id., paras. 1(d) and (h).

<sup>126</sup> Id., para. 1.

<sup>127</sup> See Donnelly (1983) p. 547.

<sup>128</sup> A/CONF.157/23 (12 July 1993).

a “detrimental reliance” in those to whom duty is owed.<sup>129</sup> A brief discussion of the sources therefore follows.

#### 4.1 THE UN CHARTER AND UDHR

The UN Charter, supplemented by the UDHR, affects every state’s human rights obligations across the spectrum, of how states treat people, not each other. Article 1.3 of the UN Charter expresses the importance of human rights and cooperation in an international order of changing subjects and power. Articles 55 and 56 of the Charter require states “pledge themselves to take joint and separate action in cooperation with the Organization” to help achieve respect and observance of human rights and fundamental freedoms for all without discrimination. Gutter indicates that Article 56 has no specific obligation for states to act at the national level to promote human rights, only within the UN.<sup>130</sup> But decades earlier, Hersch Lauterpacht maintained otherwise, that the Charter imposed on members the “legal duty to respect and observe fundamental human rights and freedoms.”<sup>131</sup> This duty applies to state conduct toward the UN, other states, and persons. In any event, the UPR falls squarely within Article 56, not to mention the pledge incorporated in Resolution 32/130, discussed in Chapter 4, that should permeate into all procedures like the HRC and UPR that come under UN purview.

The UDHR is not simply an interstate affair, but goes to the core relationship between states and persons, based on human dignity. It constrains state behavior, but also provides direction to create “positive” legal rights through legislation and administrative practice.<sup>132</sup> No state can legitimately argue the UDHR has no legal mandate. Numerous UN resolutions and statements refer, for example, to “the duty of

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<sup>129</sup> See Restatement (Second) of Contracts (1981) § 90.

<sup>130</sup> Gutter (2006) p. 19.

<sup>131</sup> Lauterpacht (1950) p.147.

<sup>132</sup> See Eide (2007) p. 141.

states to fully and faithfully observe the provisions of the Universal Declaration.”<sup>133</sup> It is recognized explicitly in Resolution 60/251 creating the HRC.

If one assumes the UDHR defines the general pledge agreed in the Charter, then failure to respect its enumerated rights may constitute violations, even without consensus about the character and extent of obligations, and even if no remedy yet exists. States in the UPR mechanism, and other stakeholders, may fulfill their obligations expansively, using UDHR provisions as the basis to scrutinize and measure country performance, particularly as formal accountability is lacking.

## 4.2 THE COVENANTS (TREATIES)

After the UDHR’s adoption in 1948, it took almost 30 years, colored by the Cold War setting and colonial dimension, for the Covenants to take effect. Over 160 states fall within their purview.<sup>134</sup> Until then, international human rights law, generally, was built on the Charter and UDHR, custom from state practice, and general principles established from state acts, such as national laws. The Covenants and other human rights treaties have significant roles, a separate topic.<sup>135</sup> Treaty monitoring bodies, composed of representatives serving in personal capacities, focus on compliance, largely removed from the political part of international relations where the UPR resides. They are quasi-judicial organs of the UN system, each with a distinct, independent mandate. There is a need for interaction, however, particularly as Resolution 60/251 requires the UPR to complement treaty mechanisms.

The Covenants provide a legal frame to clarify national and international obligations and diminish the effects of Article 2.7. Within their structures state sovereignty finds a counterbalance. States have authority, for example, to complain

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<sup>133</sup> A/RES/18/1904 (XVIII) (20 November 1963), the Declaration on the Elimination of All Forms of Racial Discrimination.

<sup>134</sup> Ratifications listed at UN Treaty Collection Database. 3 May 2010  
<<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>>.

<sup>135</sup> The thesis limits itself to these two foundational human treaties.

about alleged violations by other states under the ICCPR.<sup>136</sup> Though never utilized, such procedure establishes existence of a community interest and corresponding obligations to each and all states parties. Besides their monitoring functions, treaty bodies and experts create a flow of information, from varied sources, that might not otherwise exist regarding state performance in human rights, such as general comments that assist and influence both states and rights holders to delineate the nature and scope of human rights and obligations and issues of compliance.

General Comment 31 concerns the general obligation imposed by ICCPR, Article 2.

While the treaty is:

couched in terms of the obligations of State Parties towards individuals [...] every State Party has a legal interest in the performance by every other State Party of its obligations [...] from the fact that the “rules concerning the basic rights of the human person” are *erga omnes* obligations and that [...] there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.<sup>137</sup>

Other obligations are explained in General Comment 3, concerning ICESCR, Article 2,<sup>138</sup> that notes the interdependence and indivisibility of human rights, irrespective of political system, and that the core of obligation is to ensure satisfaction, by conduct, of minimum essential levels of each of the rights to the maximum of available resources.<sup>139</sup> The Committee expressed, “in accordance with Articles 55 and 56 of the Charter [...] [and] with well-established principles of international law [...] international cooperation for development and [...] realization of economic, social and cultural rights is an obligation of all States.”<sup>140</sup>

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<sup>136</sup> See ICCPR, Art. 41.

<sup>137</sup> CCPR/C/21/Rev.1/Add.13 (2004) para 2.

<sup>138</sup> E/1991/23(SUPP) (14 December 1990) pp. 83-87.

<sup>139</sup> Id., para. 10.

<sup>140</sup> Id., para 14.

Human rights include the right to demand state policies and legislation that genuinely pursue the objective of full realization.<sup>141</sup> In this context, the state's burden is to demonstrate it made every effort to use all resources at its disposal, as a matter of priority, to satisfy its obligation. Overall, the state must strive to ensure the widest possible enjoyment of rights under the prevailing circumstances, monitor their realization, and devise strategies and programs for promotion, irrespective of resource constraints.<sup>142</sup>

The UPR's relationship to the Covenants is complicated, a thesis topic by itself involving, *inter alia*, scope of coverage and complementarity issues discussed briefly, in Sections 3.3 and 5.3.4, respectively. It will take years to discover if the UPR will be used by states to reinforce the Covenants (and special procedures) or to create outcomes with conflicting recommendations that could undermine treaty obligations. Nonetheless, even if a state has not ratified a treaty, the guiding principles that underlie treaty obligations seem applicable to UPR examinations, keeping in mind that treaties have distinct and independent mandates that remain for those states that have consented to be bound by the treaties and their monitoring procedures.

#### 4.3 HUMAN RIGHTS DEVELOPMENT AND CUSTOMARY LAW

Obligations of states in human rights, and thus the UPR, remain tethered to traditional customary law and modern human rights law. Although customary international law is not expressly included in the UPR basis of review, it cannot be summarily excluded. Violations of customary international law of human rights, in substance, require a nexus to official governmental policy, presumed when acts, especially by government officials, are repeated or notorious and steps not taken to prevent them or punish the perpetrators.<sup>143</sup> A consistent pattern is necessary, unless the conduct involves acts "inherently gross,"<sup>144</sup> particularly shocking because of a right's

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<sup>141</sup> Eide, (2007) p. 143.

<sup>142</sup> E/1991/23(SUPP) (14 December 1990), para. 11.

<sup>143</sup> Restatement (Third) of Foreign Relations Law of the United States (1987) §702, Comment b.

<sup>144</sup> Peremptory norms (*jus cogens*) enumerated in clauses (a) to (f). Agreements that violate them are void.

importance or the gravity of the violation.<sup>145</sup> Violations may be deemed “gross” *ipso facto* when human rights are internationally recognized as fundamental and intrinsic to human dignity.<sup>146</sup> Although this provides a background for what constitutes violations, it does not explain how non-treaty human rights law can develop.

Traditional customary law and modern human rights law exist on separate planes in the manner of formation, and limitations of one should not impede the other. The habitual approach to impose obligation is to rely on *opinio juris* to confirm state practice or perhaps infer *opinio juris* from existing state practice. The *North Sea Continental Shelf*<sup>147</sup> cases indicated, to qualify as custom, state practice must evidence a belief it is obligated by the rule of law requiring it.<sup>148</sup> Value is attached to what states do more than what they say. This view currently prevails in the HRC and UPR. But when issues of dignity and community values are predominant (human rights, *jus ad bellum*, armed conflict, the environment), the established approach appears problematic.<sup>149</sup>

Establishing obligation in the area human or humanitarian rights seems less to do with custom than with conduct. Traditional custom mostly affects actions between states, not states and individuals. Development of state obligation can be less onerous than in other fields of international law.<sup>150</sup> Organs that administer human rights law, treaty bodies and international tribunals, have tendency to use a deductive, conduct based approach, arising from fundamental legal and equitable principles rather than induction. This approach looks at state conduct, emphasizing what they say rather than what they do, to define state practice.<sup>151</sup> It relates to the equity approach discussed in

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<sup>145</sup> Ibid. See also §701, Reporters’ Note 6.

<sup>146</sup> Such as freedom from systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of freedom of conscience and religion; and denial of basic privacy such as the right to marry and raise a family.

<sup>147</sup> 1969 ICJ Reports 3.

<sup>148</sup> Id., para 77.

<sup>149</sup> 73 Int’l L. Ass’n Rep. Conf. (2008) p. 670.

<sup>150</sup> See Meron (1989) p. 113.

<sup>151</sup> Assent to their pronouncements is deemed further indication of state practice.



Section 4.4. It was discussed in *Nicaragua*<sup>152</sup> where the ICJ observed it “must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice,” thus turning around *North Sea Continental Shelf*.<sup>153</sup> Inconsistent state conduct, if condemned and the state does not claim to act as a matter of right, is a breach, not indicative of a new rule.<sup>154</sup>

Akehurst said that state practice means any act or statement by a state from which views about customary law can be inferred.<sup>155</sup> Conduct consistent with the deductive interpretation of development includes “virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle.”<sup>156</sup> Actions by states to conform their national law or practice to standards or principles declared by international bodies, and incorporation of human rights provisions, directly or by reference, in national constitutions and laws would strongly seem to establish further basis for reliance that the state is obligated.<sup>157</sup> So, too, may communications or actions which reflect that certain practices violate international human rights law, like a condemnation or adverse reaction to violations by other states.<sup>158</sup> Many of these wide and varied actions are absorbed into international law as general principles common to the major state legal systems.<sup>159</sup>

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<sup>152</sup> 1986 ICJ Reports 14.

<sup>153</sup> *Id.*, para 184.

<sup>154</sup> *Id.*, para 186. The new approach is not uncontroversial, however, as illustrated by the US reaction to the ICRC study *Customary International Humanitarian Law*. 10 May 2010  
<[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/\\$File/irrc\\_866\\_Bellinger.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p443/$File/irrc_866_Bellinger.pdf)>.

<sup>155</sup> Akehurst (1977) p. 1.

<sup>156</sup> Restatement (Third) of Foreign Relations Law of the United States (1987) §701, Reporters' Note 2.

<sup>157</sup> *Ibid.*

<sup>158</sup> See Dimitrijevic (2006) p. 5.

<sup>159</sup> Restatement (Third) of Foreign Relations Law of the United States (1987) §701, Reporters' Note 2. 2 and §702, Reporters' Note 1.

Issues of human rights are primarily seen in how a state treats people under its jurisdiction, but states owe duties to all other states.<sup>160</sup> A state may expect that other states will not act to increase the likelihood of individual and collective damage. The right against illegal use of force under Article 2.4 is a prime example. Human rights violations can also threaten international peace and security and result in breaches of duties owed to the community of states as a whole and its members. Obligations *erga omnes* are recognized in customary human rights law, and corresponding rights to protection concerning basic human rights have entered the body of general international law.<sup>161</sup> Rules of customary law allow any state, in principle, to invoke ordinary remedies available when its rights are violated.<sup>162</sup>

In the political UPR forum, where the dignity interest should take precedence, duty to the whole extends into state conduct during the UPR process, discussed in Section 5.3, where transparency, participation and efficiency seem indispensable to create credibility in the eyes of the world. Custom and conduct merge with the interest of the community as a whole to provide a basis for inquiry. As global values gain significance, the deductive method to identify and implement rules of international human rights law may increase in familiarity and acceptability. Interactive dialogue presents an opportunity where states, with the participation and support of stakeholders, may project ideas and solutions to further dignity and community interests, followed by recommendations, and grow promoted norms of behavior and effective scrutiny.

#### 4.4 *JUS COGENS* AND PEREMPTORY NORMS

Pursuant to Article 53 of the Vienna Convention of the Law of Treaties, a *jus cogens* norm is: “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only

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<sup>160</sup> Such as *erga omnes* obligations, discussed below.

<sup>161</sup> *Barcelona Traction*, 1970 ICJ Reports 3, paras. 33-34.

<sup>162</sup> Restatement (Third) of Foreign Relations Law of the United States §703(2) and Comment *b* to that section.

by a subsequent norm of general international law having the same character.”<sup>163</sup> The International Law Commission (ILC) introduces the concept as “peremptory norms.”<sup>164</sup> *Jus Cogens* has relevance outside the scope of treaty law based on consent and reciprocity. States have independent, positive duties to cooperate to end any serious breach arising under a peremptory norm of general international law.<sup>165</sup>

In the human rights context, *jus cogens* has overlapping, interdependent dignity and communitarian components. In *Nicaragua*, the ICJ cited the ILC, that the UN Charter “concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*,”<sup>166</sup> but did not use *jus cogens* in a holding. For example, *The Wall* case, where states were advised to lawfully cooperate to end serious breaches of obligations arising under a peremptory norm, was based on obligations *erga omnes*.

Not until 2006 did the ICJ refer to *jus cogens* for the first time, in *Congo v Rwanda*, to directly say that prohibition of genocide has the character of a peremptory norm.<sup>167</sup> Judge Lauterpacht called genocide, the worst offence against the human person, “one of the few undoubted examples of *jus cogens*”<sup>168</sup> Whether other fundamental human rights have similar status is more contentious. Judge Tanaka proclaimed all human rights have peremptory status.<sup>169</sup> However, it is more accurate to say there is general agreement over some rights<sup>170</sup> while others have varying degrees of support.<sup>171</sup>

According to the Restatement (Third) of the Foreign Relations Law, peremptory norms are established through acceptance and recognition by a “large majority” of states,

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<sup>163</sup> A/Conf.39/27 (23 May 1969).

<sup>164</sup> ILC Draft Articles on Responsibility (2001) pp. 110-116. A/56/10 (2001).

<sup>165</sup> *Id.*, Section 41 and commentary.

<sup>166</sup> 1986 ICJ Reports 14, 100.

<sup>167</sup> 2006 ICJ General List No 126, para. 42.

<sup>168</sup> *Bosnia and Herzegovina v. Yugoslavia*, Separate Opinion, 1993 ICJ Reports 407, 440, para. 100.

<sup>169</sup> *South West Africa, Second Phase*, Dissenting Opinion, 1966 ICJ Reports 3, 250, 293.

<sup>170</sup> Such as prohibitions involving slavery, racial discrimination and apartheid.

<sup>171</sup> Prohibition of of torture, right to life, equality and non-discrimination. Dignity based rights violated by grave breaches of international humanitarian law may also possess peremptory status.

even over dissent by “a very small number of states.”<sup>172</sup> Skepticism remains over the scope of the doctrine. During UPR proceedings, states and civil society may seek to elicit which matters constitute *jus cogens*, then to broaden the application to acts that further these peremptory norms to accelerate evolution of the international legal system where human rights from dignity and personal autonomy have greater influence.

#### 4.5 EQUITABLE PRINCIPLES

International law between states, especially the law of treaties, functions much like a contract between parties. Implied is a duty of good faith.<sup>173</sup> Thus, obligations from conduct may justify use of equity as a further source of law in the form of an estoppel, based on detrimental reliance. The seeds of estoppel are strewn throughout customary public international law, both with regard to relations between states and relations between states and private parties.<sup>174</sup> In *Nuclear Tests*,<sup>175</sup> the ICJ said:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. [...] [E]ven though not made within the context of international negotiations, [it] is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required [...] since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.<sup>176</sup>

Intent to be bound, as expressed by declaration or conduct, confers upon it the character of a legal undertaking. Thereafter, the state is legally required to follow a course of conduct consistent with it.<sup>177</sup> Electoral pledges by states are examples. Such matters deserve examination at the UPR.

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<sup>172</sup> Restatement (Third) of Foreign Relations Law of the United States §102 and reporter’s note 6 (1986).

<sup>173</sup> See VCLT Article 31.1. See also Restatement (Second) Contracts §205.

<sup>174</sup> See Bowden (1993) fn. 5 for examples.

<sup>175</sup> 1974 ICJ Reports 457.

<sup>176</sup> *Id.*, para. 46.

<sup>177</sup> *Ibid.*

At its heart, estoppel is the notion that one party to a dispute should not be permitted to take a position inconsistent with one previously taken, when it would be unjust to the other party to do so.<sup>178</sup> Thus, it generally applies to the same character of conduct defined by Eide that causes insecurity and fear impeding enjoyment of rights, calling for protection by the state, such as fraud or unethical behavior,<sup>179</sup> exploitation or corruption, and unconscionable acts covered by peremptory norms.<sup>180</sup> Promissory estoppel developed to enforce a promise absent bargained-for consideration, where doing so was necessary to avoid injustice.<sup>181</sup>

The American Law Institute (ALI), in Section 90 of the Restatement (Second) Contracts, defines the doctrine as follows: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Courts, in essence, substitute detrimental reliance for the element of consideration required to make an enforceable obligation.<sup>182</sup> There must be actual and reasonable reliance on the promise, determined case-by-case, taking all factors into consideration. Probability of reliance lends support to the enforcement of the executory exchange. In this area, reliance may have replaced promise as the basis of liability.<sup>183</sup>

Based on the foregoing, in the UPR, it seems reasonable and appropriate to rely on the promises or representations, express or implied, of a state concerning its law, or acts undertaken respecting human dignity or community interests, or to win the votes of other states. These create obligations, the failure of which to comply, if detriment has been suffered, would seem subject matter for the UPR concerning the contradiction(s), followed by appropriate recommendations and specific follow-up to prevent further

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<sup>178</sup> Bowden (1993) p. 127.

<sup>179</sup> See Eide (2007) p. 150.

<sup>180</sup> See Restatement (Second) Contracts §208.

<sup>181</sup> See Luepke (2002) pp.132-133.

<sup>182</sup> Ibid.

<sup>183</sup> Yorio (1991) p. 112.

injustice or impunity. If nothing else, getting these matters in the public domain may deter states from making promises they do not intend to keep.

## **5 OBLIGATIONS AND CATEGORIES OF INTERESTS AT THE UPR**

Compliance with legally binding human rights obligations helps improve human rights for the ultimate beneficiaries on the ground. What human rights obligations do states owe, and into what categories of interests may these obligations fall with respect to the UPR? According to Eide, despite an intrinsic belief that human rights will weaken their grip on sovereignty, states are actually stronger when obligations are observed to improve realization.<sup>184</sup> The international responsibility of Article 1.3 to promote and encourage respect for human rights and fundamental freedoms, by implication, furthers the UN purpose to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>185</sup> Article 55 reinforces Article 1.3 and under Article 56 states pledge to act cooperatively to achieve Article 55.

A fundamental purpose of human rights is to limit state power over persons and empower exercise of autonomous rights to live in dignity and realize full potential. Human rights obligations help establish guarantees that governments cannot neglect in performance of their duties. Article 22 of the UDHR states that each person as a member of society is entitled to realize rights indispensable for dignity and free development of the personality. Article 28 of the UDHR provides: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Principles molding compliance help states and stakeholders know and translate rights and responsibilities into implementation.

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<sup>184</sup> Eide (1987) paras. 200-202.

<sup>185</sup> UN Charter, Article 1.2.

In the context of the evolving UPR, categories of interests emerge from examination of state human rights obligations under international law. Like human rights in general, they are interrelated and interdependent, and often overlapping. They provide criteria to evaluate the UPR mechanism and state conduct, to help draw partial conclusions about the UPR and its place in the greater UN human rights machinery.

## 5.1 INTERESTS BASED ON DIGNITY OF PERSONS

### 5.1.1 Personal Autonomy

The right to personal autonomy, to secure individual enjoyment of human rights, is recognized by the Charter and UDHR as an aspect of agency that states must respect. It is, arguably, not unlike the right of self-determination to exercise control over both one's destiny and resources, while not acting coercively to subordinate exercise of the same by others.<sup>186</sup> Article 22 of the UDHR states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and the resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The above provision was a compromise between competing views about whether obligations should be expressly part of the UDHR component.<sup>187</sup> Obligations were not included, perhaps causing Socialist Bloc abstention in voting for the UDHR.<sup>188</sup> The premise for Article 22 is that "no personal liberty could exist without economic security and independence. A man in need is not a free man."<sup>189</sup>

"Self-determination" is grounded to the tradition international law paradigm, where battles were mainly fought on an external level, amid shifting political power between states, developed through custom and state practice. As discussed in Section

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<sup>186</sup> Eide (1987), at paras. 196-199 discussed this in the context of self-determination of states and peoples.

<sup>187</sup> See *Id.*, para. 98.

<sup>188</sup> *Id.*, fn. 63, citing E/CN.4/SR.81, p. 28.

<sup>189</sup> *Id.*, fn. 62, citing E/CN.4/SR.64, p. 5.

4.3, when dignity is the foundation, legal obligations develop differently. The principle of self-determination thus expanded to include “peoples” on the internal level and, based on the UDHR, appears to extend to the micro level down to each person, seen in the concept of autonomy.<sup>190</sup> Unfettered, however, such freedom to develop without interference can lead to asymmetries, internally or internationally, and conditions dangerous for human rights.<sup>191</sup> International law has helped provide redress,<sup>192</sup> but fragmentation of law and cultural perceptions of human rights present challenges. The UPR can serve to balance competing, legitimate claims between states and individuals, bringing them to the table, and from such a deliberative process may result outcomes that are realistic and provide added value.

#### 5.1.2 Respect, Protect, Fulfill

When states comply with human rights obligations, theory crosses into the practical. While human rights are grounded in freedom of the individual, largely from the state, Eide indicates the state must protect against harmful private acts that create insecurity and fear, like violence, exploitation, corruption and fraud.<sup>193</sup> This protection function partly underlies the emergence of the liberal state. The obligation goes further, including some common goods beyond the capacity of private action, like primary education for all or a core social safety net.<sup>194</sup> As a corollary, the state must also ensure that people not experience discrimination in the enjoyment of their rights.<sup>195</sup>

Treaty bodies took an approach of “passive” duties associated with civil and political rights and “active” duties associated with economic, social and cultural rights. Eide saw three different types of obligations, each applicable to both categories of rights

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<sup>190</sup> One could argue that states act as fictitious persons when they exercise self-determination in international law.

<sup>191</sup> See Eide (1987) paras. 200-202.

<sup>192</sup> Ibid.

<sup>193</sup> Eide (2007) pp. 145-146.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.



in combination and balance between them.<sup>196</sup> As UN Special Rapporteur for Food in 1987, he constructed a tripartite typology of human rights obligations owed by states.<sup>197</sup> States are obligated to respect, protect and fulfill human rights. These types of obligations are interrelated and interdependent in the context of all human rights, whether requiring immediate implementation of progressive realization.<sup>198</sup>

The respect obligation is fundamental. The state, and all its organs and agents, are not to violate integrity of the person or infringe on individual freedom, including use of material resources one sees fit to best satisfy basic needs.<sup>199</sup> It is not subject to progressive realization.<sup>200</sup> When individuals or groups can take care of their needs without hindering others from the same, states must not interfere.<sup>201</sup> This obligation appears universally applicable as customary human rights law, codified under the Charter and UDHR.

The protect obligation requires the state to prevent others from violating individual integrity, freedom of action, or other human rights, including enjoyment of material resources.<sup>202</sup> Protection generally involves wrongful or oppressive conduct, and has wide application and implementation. As with the respect obligation, immediate performance is required. Protection can also give rise to activities and measures that themselves impose duties to respect, protect and fulfill.<sup>203</sup> For example, it may cover the exercise of due diligence to prevent attacks on life, physical integrity, or liberty.<sup>204</sup> States must act to punish violations and attempt, if possible, restoration and/or compensation for damages.<sup>205</sup>

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<sup>196</sup> Ibid.

<sup>197</sup> E/CN.4/Sub.2/1987/23 (1987).

<sup>198</sup> Eide (2007) p. 156.

<sup>199</sup> Eide (1987) para 67.

<sup>200</sup> Id., para. 72.

<sup>201</sup> Id., para. 67.

<sup>202</sup> Id., para 68.

<sup>203</sup> See Eide (2007) pp. 150-151. Measures to respect or to fulfill share this feature.

<sup>204</sup> Velásquez Rodríguez at paras. 79 and 166. See also Hessbruegge (2004) p. 283.

<sup>205</sup> See Hessbruegge p. 275.

The fulfill obligation requires state measures to ensure opportunities for each individual to fully enjoy all human rights as recognized in the human rights instruments, yet cannot be secured by personal efforts.<sup>206</sup> Fulfillment may occur in different ways. It does not mean to simply give. In most cases it can be met with *facilitation*, like instituting a social security system to which people contribute.<sup>207</sup> But when, for reasons beyond their control, people cannot take care of their own needs, the obligation rises to *provide*. Eide sees *promotion* as part the fulfill obligation, particularly raising awareness to state agents, but it extends to all parts of the typology.<sup>208</sup>

Obligations to respect, protect and fulfill further contain interrelated aspects regarding conduct and result.<sup>209</sup> Conduct goes to the behavior a duty-holder should follow or abstain from. Result looks to a particular outcome to attain through implementation of policies and programs.<sup>210</sup> Obligations of conduct should be specific. Obligations of result, absent some ability to feasibly measure, may only be intended to build political effect and momentum. A parallel is seen in UPR recommendations. Those that are specific and concern matters of conduct, compared to aspiration of results, likely have better chance of follow-up and implementation. Arguably, state undertakings like election pledges assume the character of a binding conduct obligation and should be particularly scrutinized as such, in the context of the wider UPR examination of results.

At stake is whether the UPR can help make states meet their dignity obligations at ground level. The goal is optimal balance between freedoms and satisfaction of needs, considering the sovereign rights of states and peoples, taking account of different contexts and levels of development and social organization.<sup>211</sup> As the UPR moves forward, the typology may be a template for examination, to raise, universally, in unique

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<sup>206</sup> Eide (1987) para. 69.

<sup>207</sup> Eide (2007) p. 152.

<sup>208</sup> Id. at p. 153.

<sup>209</sup> Paragraph 7. See also General Comment 12 CESCR, E/C.12/1999/5 (12 May 1999) at paras. 15 and 16.

<sup>210</sup> Eide (1987) para. 71.

<sup>211</sup> Id., para. 70.

reviews, an approach that balances interests and permits the SUR to assess its own compliance, satisfying the requirements of Resolution 5/1.

## 5.2 INTERESTS BASED ON COMMUNITY OF STATES

The community interests of states, individually and as a whole, gives rise to a different types of obligations, though connected to dignity. Textbook examples of such interests are in areas like piracy and Chapters VI and VII of the UN Charter, involving dispute resolution and state duties regarding maintenance of international peace and security. Implied in the group relationship among states are duties of good faith and cooperation, and responsibilities with respect to obligations *erga omnes*.<sup>212</sup>

### 5.2.1 Good Faith and the Meaning of Cooperation

Good faith is an underlying theme in public international and domestic law. *Nuclear Tests* stated: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."<sup>213</sup> As discussed in Section 4.4, good faith is implied in the quasi-contractual setting of international relations and domestic laws of states. Bowden illustrates that German civil law starts with "performance in good faith" and Egyptian law requires good faith in performance of contracts, binding the party "not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract."<sup>214</sup> Good faith conduct thus extends to acts foreseeable and implied from obligations and undertakings, including those from participation in the UN and UPR and the implementation of policies, resolutions and outcomes.

Resolution 60/251 provides that the UPR shall be cooperative, but the term is undefined. A non-adversarial procedure was intended, to change the dynamic from the

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<sup>212</sup> The literal meaning of the Latin term is "in relation to everyone."

<sup>213</sup> 1974 ICJ Reports 457, para. 49.

<sup>214</sup> Bowden (1993) p. 128.

politicization at the CHR over country specific criticism of states' affairs. Success may be near impossible to achieve because of diversity and different realities, yet virtually all states share this common interest. Getting to the core of "cooperation" is arguably the key to reform efforts after the CHR. The UPR mechanism is but one of the playing fields.

As touched on previously, Articles 1.3, 55 and 56 of the Charter set forth individual and collective duties for all states in the community to cooperate as a component of compliance. Here, cooperation is substantive, positive conduct with a nexus to implementation of dignity rights. Such cooperative conduct manifests good faith and friendly relations. It occurs, for example, from a standing invitation to special procedure rapporteurs or promotion and provision of education, advisory services, technical assistance, and capacity building.

A different connotation of cooperation comes from Article 2.7. It is procedural and negative in application, with a nexus not to dignity, but political, sovereign self-interest. In this context, it can be used as a sword to cut away scrutiny. At the first session of the HRC on 20 June 2006, China, for example, indicated success would largely depend "on whether countries [...] treat each other as equals, and address their differences in a constructive way."<sup>215</sup> Cuba, more provocative, framed the matter in terms where the developed North gets impunity, the underdeveloped South scrutiny, especially "those that do not bow their head."<sup>216</sup> Some states utilize "confrontation" as justification not to cooperate in substance, for example, with appointed representatives or special procedures.<sup>217</sup>

Presently, the spirit of Article 2.7 cooperation prevails in the UPR process. SUR consent is needed to adopt recommendations and the outcome report. But cooperation to avoid "confrontation" can limit the ability to engage in effective, realistic scrutiny or

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<sup>215</sup> Statement by Yang Jiechi, 20 June 2006. 5 May 2010  
<<http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/china.pdf>>. See Gaer (2007) pp. 131-132.

<sup>216</sup> Statement by Felipe Pérez Roque, 20 June 2006. 5 May 2010.  
<<http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/cuba.pdf>>.

<sup>217</sup> See Gaer (2007) p. 130.

offer constructive criticism. It can weaken recommendations so as to obtain SUR consent. Cooperation required by Resolution 60/251, as now practiced, tends to stifle discourse and hinder the more fundamental substantive cooperation required by the Charter. The larger question remains whether such a state-centric cooperative approach will actually bring change from states that commit gross violations of human rights.

### 5.2.2 Community Interests and Obligations *Erga Omnes*

The community obligation mainly involves the community of states and interactions between states, but it has a larger dimension. It includes considerations of individual dignity interests, largely developed from matters of diplomatic protection and treatment of foreign nationals, matters of concern to all members of the community. *Barcelona Traction* recognized that every state has a legal interest in protection of such interests.<sup>218</sup> From them derive obligations *erga omnes* that include outlawing acts of aggression and genocide, as well as principles and rules concerning the basic rights of the human person. Some of the corresponding rights of protection have entered the body of general international law, others by instrument.<sup>219</sup> Obligations *erga omnes* was referenced in subsequent cases.<sup>220</sup> In the advisory opinion on *The Wall*<sup>221</sup> the Court suggested a legal obligation to not recognize the results of breaches.<sup>222</sup>

When a state acts with respect to obligations *erga omnes*, it does for the collective, not in an individual capacity. The duty owed is to the “international community as a whole.”<sup>223</sup> This is broader than the community of states, which it subsumes. Article

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<sup>218</sup> *Barcelona Traction*, 1970 ICJ Reports 3, para. 33. See also ILC Report (2008) p. 668.

<sup>219</sup> 1970 ICJ Reports 3, para. 34.

<sup>220</sup> For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, 1996 ICJ Reports 595, 616.

<sup>221</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports 136.

<sup>222</sup> *Id.*, para. 159.

<sup>223</sup> Article 48, ILC Draft Articles on Responsibility (2001) pp. 110-116. A/56/10 (2001). The notion was previously recognized in Article 59, 1982 UN Convention on the Law of the Sea. See Crawford (2002) pp. 276-280.

48 of the ILC Draft Articles on Responsibility uses this broader terminology, perhaps purposefully, to conform to the view that the international community now includes important subjects other than states.<sup>224</sup> Article 28 of the UDHR says that everyone is entitled to a social and international order in where the rights and freedoms of the UDHR can be fully realized. From a human rights standpoint, realization of such social and international order is the duty of the international community as a whole.

Emergence of transnational issues, where territorial boundaries are almost meaningless, further strengthens this notion of the whole, along with corresponding duties of each state. There community interest includes a duty that activities within a state's jurisdiction or control not damage common, shared resources.<sup>225</sup> This abuse of rights principle, from the *Corfu Channel* case,<sup>226</sup> provides that sovereign rights are correlative, interdependent and subject to reciprocal limitations.<sup>227</sup> Similar and complementing dignity rights at the domestic level, protection of obligations *erga omnes* conflict with state sovereignty in areas such as aggression, genocide, slavery and racial discrimination,<sup>228</sup> and self-determination.<sup>229</sup>

It was feared that *erga omnes* human rights obligations would open the floodgates of states turned prosecutor, but the issue has been raised sparingly,<sup>230</sup> understandably if one looks at the evolution of the UPR to date. The stage is set, however, to further invoke state responsibility for breach of human rights obligations owed to the international community. Each state has responsibility to work domestically and internationally to create and maintain the international order envisaged in article 28.<sup>231</sup> Whether or not

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<sup>224</sup> See Weiss (2002) p. 804.

<sup>225</sup> The natural environment is one such area, the "Common heritage of mankind" another.

<sup>226</sup> 1949 ICJ Reports 4, 22.

<sup>227</sup> Eide (1987) para. 205.

<sup>228</sup> *Barcelona Traction*, para. 34. See also Sivakumaran (2009) pp. 136-137.

<sup>229</sup> *East Timor (Portugal v. Australia)*, Judgment, 1995 ICJ Reports 90.

<sup>230</sup> See Sivakumaran (2009) pp. 136-137. States have never used the interstate complaint mechanism provided in the ICCPR either.

<sup>231</sup> Eide (1987) para. 99

states have the political will to act in a public setting, or choose traditional, less transparent means of diplomacy, remains to be seen.

### 5.3 INTERESTS BASED ON THE PROCESS

In 1977, General Assembly Resolution 32/130, discussed in Chapter 4, decided the approach for future work within the UN system should take account that all human rights and fundamental freedoms “are inalienable and deserve equal attention.”<sup>232</sup> Full realization was impossible unless consideration was given to implementation, promotion and protection.<sup>233</sup> Paragraph 1(d) of Resolution 32/130 stated that human rights questions “should be examined globally, taking into account both the overall context of the various societies in which they present themselves, as well as the need for the promotion of the full dignity of the human person and the development and well-being of the society.”

The above decision, arguably, imposes a substantive process obligation, in addition to agreed principles that the UPR should be conducted in an “objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner.”<sup>234</sup> Behavior consistent with these dictates would seem to “respect, protect and fulfill” this duty to process, within the context of good faith and cooperation, as perhaps the crux of HRC reform. Perception is in the eye of the beholder. Decisions by states regarding the UPR process will prove determinative to where it follows. When matters of dispute occur, a good faith, balanced approach, to the process, taking account of dignity and community interests, seems consistent with the objective to strengthen the mechanism and achieve cooperation under the UN Charter.

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<sup>232</sup> A/RES/32/130 (1977), paras. (c) and (a).

<sup>233</sup> *Id.*, paras. (a) and (b).

<sup>234</sup> Joint NGO Statement on Item 6, eighth session, HRC, 13 June 2008.

### 5.3.1 Selectivity and State Participation

State selectivity in the process often occurs first in choosing how or when to participate in the interactive dialogue. Member and observer states are free to select what they report, who will represent them, to whom they direct comments, questions and responses, and the content of recommendations, if any. Politics is intimately involved. States organize and act in groups and networks of common interests. Block voting, which seriously affected the CHR, remains a major challenge at the HRC and, correspondingly, the UPR.<sup>235</sup> States might, for example, commend friends, but offer no critical comments, questions or recommendations. This has reached extremes, as in the reviews of Tunisia and Jordan.<sup>236</sup>

Under present rules, particularly in important reviews, states may have insufficient time to adequately participate in the highly abbreviated UPR, and limits on opportunity to speak. In reviews of China and Cuba in 2009, even with time limits slashed, almost half of the states were unable to speak or contribute recommendations.<sup>237</sup> The practice of forming a line where states provide laud to kill the time, ask softball questions, or propose vague recommendations, continues.<sup>238</sup> NGOs have concluded the UPR does not move past politicization, but in some cases the opposite direction.<sup>239</sup> The process obligation requires that states exercise good faith not to engage in such practices, particularly if orchestrated to filibuster,<sup>240</sup> because it violates the rights of others to participate and seek scrutiny.

Selective participation for some states may be an issue of resources. In other words, the UPR is not true to purpose if only the most committed and well-resourced states can permanently engage. Resolution 5/1 called for a UPR Voluntary Trust Fund to

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<sup>235</sup> See Abede (2009) p. 19 for examples.

<sup>236</sup> ISHR (2009) p. 40, fn. 25; ISHR (2010) p. 35, fn. 12.

<sup>237</sup> ISHR (2010) p. 34.

<sup>238</sup> UN Watch (2009). Also Sweeney (2009) p. 210.

<sup>239</sup> Joint NGO Statement on Item 6, eighth session, HRC 13 June 2008.

<sup>240</sup> See ISHR (2008) p. 40, fn. 25.



facilitate participation of developing countries in the mechanism, particularly the Least Developed Countries.<sup>241</sup> HRC Resolution 6/17 requested establishment of this fund, along with a Voluntary Fund for Financial and Technical Assistance, to provide, in conjunction with multilateral funding mechanisms, financial and technical assistance to help countries implement UPR recommendations.<sup>242</sup> Funding states, meeting their responsibilities, would show compliance with process and community obligations and strengthen the UPR to ensure needed input for it to be relevant.

Whatever the reason, in 2008 a notable drop off in attendance occurred at the WG, particularly in less prominent reviews.<sup>243</sup> Will state interests extend to human rights outside its region? For example, 43 states took the floor in Colombia's UPR, only one was African, and smaller states were reported much less likely in the interactive dialogue to engage states from different regions.<sup>244</sup> Decreased, selective participation causes a corresponding decrease in contributions and recommendations, sometimes to states that most need them. Outcome reports lacking critical comments and recommendations are less likely to reflect reality of the situation,<sup>245</sup> and diminish potential realization of the UPR's first objective, to "improve of the human rights situation on the ground."<sup>246</sup> Full participation by states is appears essential for the long term.

### 5.3.2 Transparency and Inclusion Of Stakeholders

The work of the HRC "shall be transparent, fair, impartial, and shall enable genuine dialogue."<sup>247</sup> Acting to facilitate these qualities into the UPR is an express component of the process obligation. Resolution 5/1 calls for the UPR to "ensure" participation of all

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<sup>241</sup> Paragraph 18, fn. b.

<sup>242</sup> A/HRC/RES/6/17 (2007).

<sup>243</sup> ISHR (2009) p. 40.

<sup>244</sup> Ibid. See also Sweeney (2009) p. 211.

<sup>245</sup> ISHR (2009) p. 41.

<sup>246</sup> A/HRC/5/1 (2007) para. 4(a).

<sup>247</sup> A/RES/60/251 (2006) para. 12.

relevant stakeholders.<sup>248</sup> However, states monitor themselves in the UPR and control the process. It is important to address apparent conflicts to maintain integrity.

Transparency issues arise in many variants. One example occurred over the content and scope of “general comments” by NGOs at the Plenary. Some states sought to impose the same limitation applying to states, to “express their views on the outcome of the review.”<sup>249</sup> Differences erupted in the first one hour Plenary involving Bahrain.<sup>250</sup> Pakistan raised a point of order that NGOs should not re-open discussions of the WG, joined by Egypt, but address the outcome. The President ruled that NGOs should “stick to the provision of Resolution 5/1 as well as all relevant documents.” The ensuing discussion caused greater differences and confusion.<sup>251</sup>

The broader language is significant for transparency and effective participation. To illustrate, an NGO might refer to situations neglected in the WG. In subsequent reviews, NGOs that raised human rights situations were selectively, repeatedly interrupted, even if their statements were linked to the WG outcome report or recommendations.<sup>252</sup> Only a few states protested the narrow application of Resolution 5/1, and apparently Egypt was emboldened to further insist all NGO comments be stricken from the official record.<sup>253</sup>

Transparency and participation and the process obligation also intersect in cyberspace.<sup>254</sup> Webcast of proceedings and sharing unfiltered information on the internet

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<sup>248</sup> A/HRC/5/1 (2007) para. 6(d).

<sup>249</sup> A/HRC/5/1 (2007) paras. 30, 31.

<sup>250</sup> For 9 June 2008 webcast of all statements mentioned, see HRC Webcast Archives. 6 May 2010 <<http://www.un.org/webcast/unhrc/archive.asp?go=080609#am>>. See Sweeney (2009) pp. 215-216 and ISHR (2009) p. 46.

<sup>251</sup> Ibid.

<sup>252</sup> This occurred also in HRC general debate on the UPR, during NGO comments on African or OIC States, but not when NGOs criticized others, even without links to recommendations in the WG report. See Sweeney (2009) p. 216, fn. 60.

<sup>253</sup> See ISHR (2009) p. 46. Slovenia (on behalf of the EU), Germany, Canada, Mexico and Switzerland objected. Also Sweeney (2009) p.216.

<sup>254</sup> See HRC webcasts. 6 May 2010 <<http://www.un.org/webcast/unhrc/>>. See Extranet of the OHCHR. 22 April 2010 <<http://portal.ohchr.org/portal/page/portal/UPR>> (User Name: HRC Extranet; Password: 1Session). Reports and documents also maintained there. Another site, UPR-info.org, assembles extensive information for the UPR, including from NGOs. 22 April 2010 <<http://www.upr-info.org/>>.

can reduce disparities. They expose not only the SUR, but each participant. One reason the first UPR session was delayed to mid 2008 was differences over publishing stakeholder reports on the OHCHR website.<sup>255</sup> SUR approaches vary during the interactive dialogue. Several European states were receptive to critical comments or acknowledged problems and challenges of racism or xenophobia.<sup>256</sup> Others states, as indicated above, made great effort to line up “friends” for laudatory comments that shut out critical voices, perhaps suggesting something to hide.<sup>257</sup> Some states interjected into reviews of others, as when Egypt tried to require Ecuador to reject a recommendation concerning sexual orientation that Ecuador had chosen to accept.<sup>258</sup> Without webcasting the UPR, these acts may not have received attention. Even so, dissemination on the internet and media attention are lagging.<sup>259</sup>

Consultation with stakeholders is a manifestation of open, transparent and participatory conduct, particularly at the preparation stage and implementation stages. Promoting human rights on the ground includes input from those with shared stakes. It is an act of good governance and should benefit a state’s overall health because the result of such discourse is legitimacy. Wide participation brings greater realism into SUR reports and national plans. States that involve civil society, and use the best practice to explain the nature and method of such involvement, act to respect, protect and fulfill the mechanism. Most states apparently paid lip service to inclusion, however, and few SUR reports identified the specific nature (time, place and number) of consultations that were held.<sup>260</sup>

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<sup>255</sup> See Sweeney (2009) p. 208, fn. 23.

<sup>256</sup> Such as Norway and Italy. See A/HRC/WG.6/6/NOR/1 (14 September 2009) p. 7, para. 39 and A/HRC/WG.6/7/ITA/1 (16 November 2009) p. 14, para. 62. European processes also monitor these.

<sup>257</sup> See Brett (2008) p. 10.

<sup>258</sup> See Sweeney (2009) p. 212, citing ISHR (2009).

<sup>259</sup> ISHR (2010) p. 41.

<sup>260</sup> See Abede (2009) p. 11.

NGOs previously enjoyed an established role at the CHR, including unwritten arrangements and practices that extended opportunity for active participation.<sup>261</sup> Their contributions were sought during the UPR drafting process, and new possibilities were envisioned for raising national human rights issues at the international level.<sup>262</sup> But a majority of states perceive the UPR mechanism, foremost, as a consensual, inter-governmental process, and they supported proposals to amplify that role, to the detriment of other stakeholders.<sup>263</sup> These determinations restricting stakeholder participation test the obligation to the process interest.

Civil stakeholders, although constrained, have opportunities to affect the UPR process. They closely monitor the proceedings and state participations. NGOs may forward submissions to the OHCHR for its stakeholder summary report, and full texts are now posted on the internet, expanding information about conditions in states, obligations, violations, compliance and implementation. NGOs may provide shadow reports, help frame questions, and suggest recommendations for states to use or propose. A self-evaluation by a group of NGOs of such engagement suggests that some governments were willing to take up their concerns.<sup>264</sup> Such increased reliance on civil society helps states fulfill the obligations to ensure participation and reflects substantive cooperation.

Stakeholders may, additionally, have a role in implementation of the UPR outcome that requires inclusion.<sup>265</sup> To the extent the outcome of review emphasizes cooperation to promote and protect domestic human rights, civil society should be part of that endeavor.

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<sup>261</sup> Lempinen (2008) p. 26.

<sup>262</sup> NGO involvement was far greater than in reviews of the former Sub-Commission or 1503 procedure. See Sweeney (2009) pp. 205-206.

<sup>263</sup> At an organizational meeting, for example, in May 2008, Pakistan/OIC and Bangladesh sought to limit NGOs to the maximum extent possible. See ISHR (2009) p. 46.

<sup>264</sup> Abede (2009) p. 29, fn. 86.

<sup>265</sup> A/HRC/5/1 (2007) para. 31. Abede (2009) pp. 26-27.

### 5.3.3 Efficiency and the Troika

The troika is to serve as facilitator of each review.<sup>266</sup> Written interrogatories for the SUR may be submitted in advance to the troika. It supervises the minutes and recommendations and prepares the WG outcome report, with assistance from the OHCHR and coordinated with the SUR.<sup>267</sup> Even though one troika member comes from the SUR's geographic region, Abede notes there were concerns it would unduly control and direct the abbreviated UPR mechanism, thus denying each state its place, every four years, on the world stage.<sup>268</sup> Anxiety existed in African states that troika rapporteurs would act like ad hoc country-specific mandate holders, filtering questions and issues to capture recommendations.<sup>269</sup>

Predictably, the states limited the troika's power to engage and help shape the UPR. It may not assess or evaluate matters raised by the states or the situation of human rights in the SUR.<sup>270</sup> Dignity proponents would argue, however, that such assessment and evaluation is precisely what the troika should be doing to facilitate long term improvement and success to the UPR. For the sake of the process and efficiency, investment in the troika seems a practical, common sense matter to deal with issues of participation, repetition and duplication of questions and issues, and formulation of specific, mutually agreed recommendations. Unless states want something else. According to one NGO, as the Troika had no role [in the WG], the summary of stakeholders' information and the compilation of UN information prepared by the OHCHR receive scant attention, though these documents, more than the SUR reports, reflected the realities on the ground.<sup>271</sup>

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<sup>266</sup> A/HRC/5/1 (2007) para. 18(d).

<sup>267</sup> Ibid. Also Rathgeber (2008) p. 2.

<sup>268</sup> Abede (2009) p. 14.

<sup>269</sup> Ibid.

<sup>270</sup> See A/HRC/OM/L.1 (28 February 2008).

<sup>271</sup> *Déjà vu at the UPR* (2008) p. 1.

Issues over the troika remain unsettled. With rare exception, only a small number of exclusively Western states submitted written questions.<sup>272</sup> Less than half the SURs allocated time for questions from the troika, and just a few responded directly to them.<sup>273</sup> Sweeney illustrates the case of Ireland, which switched from written questions in the first session without taking the floor, to taking the floor in the second session.<sup>274</sup> Most states may prefer oral remarks in the chamber and the public via webcast. Transparency is served, but at a cost. As indicated, when the list of speakers grows, individual time to speak shrinks, and a less realistic outcomes may result. Consolidated written questions, clearly sourced, would likely leave more time for supplemental dialogue and recommendations. Perhaps the UPR and SURs can encourage this by addressing troika matters first. The troika, also, could obviate instances where important questions and/or recommendations are left unanswered, intentionally or otherwise.

Quality of recommendations is also problematic in the UPR. When too broad, vague, or weak, implementation can be more difficult.<sup>275</sup> Recommendations can also exceed the basis of review for the UPR or conflict with those from treaty bodies or special procedures. The troika could streamline and tighten recommendations to remove deficiencies and thereby assist in HRC adoption of feasible outcomes.

Generally, utilization of the troika as indicated satisfies the duty to process under the Charter and UN resolutions. What originally was conceptualized as a system of independent rapporteurs<sup>276</sup> has essentially been reduced to a rubber stamp of the WG review and outcome report.<sup>277</sup> Without an effective troika as a buffer to keep matters on the task of human rights, risks of politicization at the UPR may grow to prevent the UPR from reaching its potential.

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<sup>272</sup> Like Russia in Ukraine's 2008 review. See Brett (2008) p. 12.

<sup>273</sup> ISHR (2009) p. 39.

<sup>274</sup> Sweeney (2009) p. 210.

<sup>275</sup> ISHR (2009) p. 41.

<sup>276</sup> See Sweeney (2009) fn. 31.

<sup>277</sup> A/HRC/5/1 (2007) para. 4(a).

#### 5.3.4 Complementarity and Relations with Treaty Bodies and Special Procedures

The relationship that develops between the UPR, treaty bodies and special procedures will be significant for human rights. Resolution 32/130, as discussed, requires UN bodies to work together to benefit the common goal of human rights, even if particular purposes may collide. Treaty bodies have expressed anxiety that the UPR will undermine the treaty body system and erode its autonomy.<sup>278</sup> There is general concern that rejection by states of UPR recommendations may overlap and adversely affect treaties and special procedures. Politics and selectivity are a reality, and can be evidenced in UPR recommendations that are vague, conflict with treaty recommendations, or lack follow-up.

On the other hand, some have suggested great scope for complementarity. There is a common objective to further country compliance at the domestic level and, while remaining mindful of the specific mandates given to treaty bodies under the relevant treaties, specific strengths from the mechanisms could be used as a form of follow-up to the others.<sup>279</sup> Potential exists for a reinforcing relationship, including participation from stakeholders, with increased cross-referencing of UPR recommendations in submissions to treaty bodies, and vice versa.

Complementarity occurs indirectly when states use the UPR occasion to declare, *inter alia*, intention to ratify outstanding treaties or submit overdue treaty reports.<sup>280</sup> Also, there are frequent references to treaty bodies and special procedures in the WG, and multiple and repetitive calls for ratifications, reservation withdrawals, and implementation of recommendations.<sup>281</sup> Some treaty body rapporteurs have started to

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<sup>278</sup> See Sweeney (2009) p. 214, fn. 54.

<sup>279</sup> See A/HRC/12/G/1 (2009) p. 2.

<sup>280</sup> Pakistan ratified the ICCPR and ICESCR just before its UPR. ISHR (2008) p. 43.

<sup>281</sup> See Sweeney (2009) pp. 213-214.

use UPR reports to prepare for examinations of states.<sup>282</sup> However, it is suggested there is vast room for improvement.<sup>283</sup>

To prevent duplication or undermining of treaty bodies or other human rights mechanisms, some experts have discussed whether the UPR should serve strictly as an implementation oriented mechanism, based on “objective and reliable information” of fulfilment by each state of its human rights obligations and commitments.”<sup>284</sup> In such case, the basis would be binding human rights obligations from ratified treaties and customary international law, as interpreted by treaty and expert mechanisms, specifically concerning the SUR or in other contexts, such as through established case law.<sup>285</sup> The main function of the HRC would be to provide oversight for non-conditional implementation of findings by independent expert mechanisms, and the UPR to exert political pressure on states to promptly implement their human rights obligations.<sup>286</sup>

It must be remembered that when looking at complementarity during this early stage of the UPR that acceptance, implementation and follow-up of UPR recommendations are not foregone conclusions. None are required. North Korea, for example, rejected 50 recommendations at the draft outcome stage.<sup>287</sup> As a consequence, this seems reason alone to safeguard obligatory treaty standards that states voluntarily accept, or the roles of special procedures rapporteurs, from vagueries and whims of a political UPR process, and particularly from abusive tactics used to weaken them.

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<sup>282</sup> See Sweeney (2009) p. 214, fn. 53.

<sup>283</sup> Ibid. ISHR (2010) p. 41.

<sup>284</sup> See Lempinen (2008) pp. 15-17.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> ISHR (2010) p. 36.



## 6 IMPRESSIONS ON IMPROVEMENT

Time will provide the most authoritative assessment of the UPR, if it gives added value and improves human rights on the ground, or serves overall to detract from efforts in human rights, particularly by treaty bodies and special procedures. Most likely it will fall in between. This thesis endeavored to see the UPR as it presently exists in hope to better understand what it can be. So much depends on what the states decide, pushed by stakeholders and others, not the mechanism itself.

Resolution 5/1 allows for a strong, purposeful UPR mechanism, but success in the intergovernmental venue may be seen more in terms of the political element and differing world views. Issues persist over the basis of review, the scope of state obligations and scrutiny in the process, and qualitative level of participation, among others. Can the UPR create long term balance to better assist states fulfill their responsibilities? Considering the widespread political disagreement between states, is this even possible?

The UPR mechanism can be a tool to spread the culture of human rights, a catalyst to improve a state's domestic policies and performance. It provides opportunity for a public examination of a state's national reality. It provides the SUR to explain its situation and state positions about the recommendations from others, particularly those rejected. It provides stakeholders and civil society a mechanism to build a knowledge base and sway public opinion. Its potential seems unquestionable. What follows are impressions and ideas related to improvement of the UPR, to spread the culture of human rights, based on the many interests presented. Of course, it is far from complete, due to lack of space, knowing full well it will evolve, and that new issues and developments are around the corner regarding review of the HRC within the UN structure.<sup>288</sup>

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<sup>288</sup> See *Outcome of the Retreat of Algiers* (2010).

## 6.1 PERSONAL DIGNITY INTERESTS

The dignity interest is at the foundation of human rights in the UN. To promote it, and establish universality, there should be clarity. For purposes of the UPR, the HRC can develop a new, separate norm of obligation based purely on the UN Charter and UDHR. It would be applied in the UPR to all states. Obligations and scrutiny should not be restricted to what is enforceable. States could also be routinely asked to specify, in the SUR report or to written inquiries, those enumerated rights in the UDHR they consider binding, and articulate, when asked, about the rights not included. Clear positions reinforce norms and prevent misunderstandings, unnecessary confrontation, and waste of time.

To supplement the foregoing, the UPR could determine a standard to ascertain when state acts assume binding effect, with presumption in favor of dignity. When an undertaking from state action creates reasonable expectation of compliance, a state could be more strictly held to the commitments and pronouncements, such domestic law or promises for election to the HRC, as a principle of law and equity, good faith and cooperation. If a state's own law does not evidence *opinio juris* and state practice, can anything? Again, ability to enforce is would not the determinant.

In the end, applying the preceding ideas could result in formulation of a core obligation and a more uniform, balanced process for each review. As discussed, some states<sup>289</sup> believe it proper to reject or propose recommendations, even some that reiterate existing treaty obligations, that based on divergent views of "internationally recognized" human rights standards, or on account of domestic law.<sup>290</sup> A core obligation could help bridge the gaps and result in more feasible, implementable recommendations and outcomes.

The highly condensed UPR process, to the extent possible, can be simplified. Focus can be streamlined, for example, to examine how each SUR respects, protects, and

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<sup>289</sup> Egypt, Bangladesh, Iran. See ISHR (2010) p. 35-36.

<sup>290</sup> A party may not invoke the provisions of its internal law as justification for failure to perform a treaty, according to Article 27 of the VCLT.

fulfills its human rights obligations, substantively and administratively, locally and transnationally. A large component could involve the challenges to state compliance, addressed without shame or stigma, including the community responsibilities of all states to assist implementation with technical support and capacity building.

The typology, as a framework for evaluation of SUR performance, with primary emphasis on dignity and community obligations, could bring a more uniform UPR procedure, and more realistic recommendations, commitments, and outcomes. It would guide state behavior in the UPR process, where the world watches all the participants. In sum, if all concerned address issues from a similar plane, areas for dialogue increase and the community interest built around cooperation is complemented.

## 6.2 STATES' COMMUNITY INTERESTS

According to the Human Rights Committee, taking interest in a state's discharge of obligations is a reflection of legitimate community interest, not unfriendly in its nature.<sup>291</sup> States can adopt more proactive roles in the UPR to stress interests of common interests of all states. Obligations *erga omnes* in human rights may originate from violations of individual dignity, but community members each have a duty to other states not to engage in misconduct and even to prevent it. Each state has an identical interest it may pursue, according to principles of public international law, to protect and further such interest.

Community obligations now extend to people outside state jurisdiction and the global community as a whole, to violations that offend human dignity and have transnational character, understanding the ramifications. Threats to international peace and security are the textbook example. States in the UPR can use the UN Charter and UDHR, particularly Articles 56 and 22, respectively, as foundation for recommendations to help establish non-conventional duties regarding community interests, including implied

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<sup>291</sup> CCPR/C/21/Rev.1/Add.13 (2004) para 2.

duties of good faith and cooperation owed to states, persons and the international community.

Community obligations may arise using either a traditional, customary law, practice approach or the more recent human dignity, conduct approach that sees noncompliance as a breach of conduct, not repudiation of state practice. In either case, when there is detrimental reliance, such as for commitments or pledges for election to the HRC, then UPR recommendations, outcome, and follow-up could address the wrong, fashioned as a remedy or to deter violative conduct and prevent impunity resulting from repudiation of actual and implied promises to oblige.

Wide scrutiny ought be the norm at the UPR. However, as seen in Section 5.2.1, procedural cooperation required by Resolution 60/251 can be used to stifle debate and hinder substantive cooperation required under the Charter. In the UPR, specifically, to obtain SUR consent may result in a narrowed scope of inquiry and may limit the reach of recommendations. Conclusory statements that tend to cut off discussion and dissemination, or convey disputed characterizations, should be promptly and consistently addressed for the record. Thus, if a state complains about confrontation over methods, or that the subject matter of recommendations interfere with domestic law or sensibilities, or inaccurately describes a bilateral dispute, it should have the burden to articulate, especially upon request, a more full explanation, with appropriate rights to reply when necessary.

Finally, states should act with purpose in their duties to assist the UPR process and implementation. The UPR places a huge strain on some less developed states and the OHCHR in terms of preparation, translation, and abilities to help the treaty bodies perform their duties.<sup>292</sup> Participation and implementation of approved UPR recommendations involving capacity-building and technical assistance require operational UPR Trust Funds.<sup>293</sup> As suggested, to facilitate participation in the UPR, the Trust Fund

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<sup>292</sup> ISHR (2010) p. 41.

<sup>293</sup> A/HRC/RES/6/17 (2007).

could create a joint permanent mission in Geneva for small states to utilize.<sup>294</sup> By attending to this financial responsibility to cooperate and assist, the developed, more wealthy states, many seeking wider intervention and more participation from less developed, poorer states often targeted, show goodwill and desire to find solutions. In other words, these are often problems of the whole.

### 6.3 UPR PROCESS INTERESTS

The UPR process is designed to produce recommendations for an outcome document, then follow-up to realize implementation. Within the mechanism, states decide procedures that affect the outcome. UPR recommendations are a starting reference point for subsequent reviews. Efforts to improve specificity and feasibility therefore seem key. Recommendations could emphasize matters of conduct, rather than result, to help with measuring implementation. The underutilized troika could help consolidate recommendations, to save time and reduce repetition and conflict, with states retaining the right to offer recommendations, if necessary. The Plenary, in the end, has the final word on adoption.

Recommendations must not, however, conflict with treaty or special procedures recommendations, or serve as justification to weaken or usurp treaty bodies or special procedures rapporteurs. Though relationships between the mechanisms remain to be seen, complementarity provides opportunity to reinforce implementation of UPR recommendations, and vice versa, with some degree of coordination. The UPR has a wider jurisdiction, including matters such as voluntary pledges and commitments falling outside of treaties, and could determine which constitute binding obligations. Subsequent reviews can monitor implementation of these obligations and accepted recommendations, looking to recent national and international human rights developments and the effects on the SUR's overall needs and performance.<sup>295</sup>

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<sup>294</sup> *Outcome of the Retreat of Algiers* (2010) p. 20.

<sup>295</sup> These can also be addressed under Item 6 of the HRC agenda, an aspect of the UPR not examined due to space restrictions.

States can lead by example in the UPR process by utilizing best practices. For example, they could increase input from civil society experts, on national delegations, such as Finland, or even the troika,<sup>296</sup> illustrating a stark contrast to those using politicians.<sup>297</sup> They can promote efficiency by enhancing the troika as an effective facilitator regarding questions, recommendations, and outcome.<sup>298</sup> Perhaps troika questions should come first. After the review itself, states can timely report on implementation, to the HRC and on the internet, of experiences, advances and challenges, such as Colombia's recent effort.<sup>299</sup> Follow-up in the UPR on approved recommendations could be guided by best practices of monitoring adopted by other international organizations, such as the IMF, WTO or other peer review mechanisms.<sup>300</sup> Finally, states can promptly meet financial commitments to the HRC and UPR Trust Funds. These are just a few of many examples.<sup>301</sup>

States can affirmatively act in the UPR mechanism to enhance substantive cooperation as the norm, in good faith. Joint and several aims are usually not accomplished without it. Claims relying on the shield of scrutiny supplied by Article 2.7 procedural cooperation could have a corresponding burden to fully articulate the basis on the record, to show good faith and share understanding, while deterring abuse. Selectivity, such as bloc voting and back slapping to protect states from scrutiny over dignity interests, should be disfavored, and participatory efforts assertively undertaken to include both less developed states and, on the domestic level, civil societies. Transparency can be encouraged and pursued, consistently and steadfastly, and zealously safeguarded. It counteracts the conflict of interest inherent in states policing themselves and creates direct and indirect opportunities for greater participation, public knowledge and awareness necessary to further push states in the direction of human rights.

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<sup>296</sup> See Redondo (2008) pp. 727, 729.

<sup>297</sup> This may become a backdoor route to expand expert involvement. See Abraham (2007) p. 39.

<sup>298</sup> *Outcome of the Retreat of Algiers* (2010) p. 19.

<sup>299</sup> 10 May 2010 <<http://www.vicepresidencia.gov.co/Es/Documents/EPU%20ENG.pdf>>.

<sup>300</sup> *Outcome of the Retreat of Algiers* (2010) p. 23.

<sup>301</sup> *Id.*, pp. 14-15.

States can increase participation of states. Attendees at the Retreat at Algiers in February, 2010 agreed the UPR presented inadequate time for real dialogue with the SUR, questions and recommendations.<sup>302</sup> Again, the troika could help alleviate this situation by coordination of questions for efficiency and recommendations for compliance with the UPR basis of the review, thus allowing more interactive dialogue. Greater state participation can lead to more and better quality recommendations, especially in low profile reviews where they may be needed most. The UPR Trust Funds can assist states to equalize participation and better fulfill the purpose of universality at the UPR. Participation includes cooperation in helping states build their capacity, particularly with regard to recommendations accepted by the SUR that give rise to other multilateral duties owed to global community interests.

States can increase non-state participation. Inclusion of stakeholders ensures other voices enter the process and furthers the integrity and overall legitimacy of the UPR. The SUR's national effort to prepare can utilize experts and civil society to help the develop realistic, accurate and complete national reports and action plans. The UPR could require details from the UPR of stakeholder participation at each stage through implementation. Member and observer states could also use experts to become more effective participants in the UPR, to formulate questions and/or propose recommendations that more effectively promote dignity and community interests. States can also advocate less restriction on NGO "general comments" in the Plenary and seek expert guidance to assess or measure implementation of approved recommendations for follow-up.

At present, the UPR process appears ill-equipped as a determinative or compliance mechanism, but more like a vessel to collect, evaluate and disseminate information for consumption by states and the international community. Achievement of its purpose, to improve human rights on the ground, will likely depend on matters like establishing effective participation for all states and non-state rights holders, operating with greater

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<sup>302</sup> Id., p. 19.

transparency and use of the internet, and adopting best practices designed to strengthen personal dignity and community rights and interests in balance with the domestic and international concerns of sovereign states.

## 7 CONCLUSION

Asbjørn Eide writes that human rights are unlikely ever to be completely transformed into positive law, nor should they be, but must forever remain a source of pressure on authorities and inspiration to those who want a better social and international order, and thereby to humanize social and international relations.<sup>303</sup> The UPR is a focal point of such pressure and inspiration.

At this point, as its 8<sup>th</sup> session has concluded, it is unclear what it will become of the UPR mechanism. It is intended to determine “fulfilment by each State of its human rights obligations and commitments.”<sup>304</sup> Needless to say, there is great latitude to make such determination. Tension between rights of persons and states in the international legal-political system is ever present. States have wide discretion how to approach the UPR process, and how it will fare, just as with human rights in general. This thesis thus looked at the UPR mechanism and state obligations related to it, in the context of the evolution of human rights at the UN, to grasp at understanding and provide a share of pressure and inspiration.

In the space available, the thesis examined immediate and controversial issues concerning the UPR process, in relation to categories of interests coming from state responsibilities in human rights law. It provided impressions about means by which state obligations can be a source of pressure to influence state conduct in the UPR and the direction it can take toward greater balance, inclusion, realism, and legitimacy. States are

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<sup>303</sup> Eide (2007) p. 157.

<sup>304</sup> A/RES/ 60/251 (2006) para. 5(e).



not just obliged in the UPR to individual, community and process interests, but such compliance and its consequences, it is believed, seem well suited to improve human rights on the ground.

Politics is never far removed, if ever, when states engage each other. Some individual states, or groups of states, will use means available to shield scrutiny into internal affairs during the few hours of a UPR, cherishing the once refuted principle of Article 2.7 to deny individuals autonomy over their own internal affairs. Other states will strive for a more open, transparent and participatory process, partly in belief that inclusion and information are requisites to overcome the apparent conflict of interest of policing themselves, to build integrity and legitimacy of process, to reach realistic and consistent outcomes when reviewing performance of states, and to create added value.

In its development to date, the UPR seems a tool of diplomacy, too deferential and protective of states' sovereign rights, generally, to allow dignity or community rights to find equilibrium in the review, scrutiny and follow-up. Restrictions on UPR participation by human rights experts and stakeholders illustrate. Phillip Alston had suggested a major role for the OHCHR and designated experts, to help formulate a concise, focused set of recommendations, based on a thorough study of the situation, but with final decision power firmly resting in the hands of the HRC members.<sup>305</sup> He said: "It is the responsibility accorded to expert inputs that will primarily distinguish the Council's more objective and systematic approach from the haphazard and unscientific country-focused discussions held by the Commission."<sup>306</sup> Yet states stick to a structure that easily produces politicization, apparently unready and unwilling to cede a degree of control.

Without substantive cooperation, binding and feasible recommendations, or follow-up and/or enforcement procedures, the UPR process may appear to observers as a political theater by states to create an illusion of concern for human rights, while not doing much of anything. Indeed, that may be what was intended. How far will states

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<sup>305</sup> Alston (2006) p. 214.

<sup>306</sup> Ibid.

actually go to scrutinize and criticize each other, especially allies, lest they be scrutinized themselves? Sri Lanka, an initial test of how the UPR would address a concurrent serious human rights situation, received more positive comments than critical interventions.<sup>307</sup> Other reviews, as indicated, have been long on praise, perhaps even to limit legitimate discourse. No matter the intentions, lack of balance in the UPR process can threaten its work and relevancy.

As an evolving intergovernmental mechanism, states have ability to bring change. Adopting best practices and lessons learned, grounded in Article 1.3 and Resolution 32/130, can help shift norms and prompt states to review modalities, orientations and practices.<sup>308</sup> The troika, for example, could become as envisioned, a facilitator rather than just organizer, assisting efficiency in the WG and the quality of recommendations in the outcome report. Greater use of experts has been mentioned, which should correspond with less politicization. And there must be increased cooperation, substantively, that includes provision of economic help for developing states to participate and implement the UPR outcome, not as perceived targets of selective oversight, but as bona fide participants.<sup>309</sup>

The UPR produces indirect benefits to dignity and community interests, some of which are beyond ability of states to control, that may have a profound long term impact. As a hub of attention, formal and informal records are created for each evaluation. Transparency, from webcasting proceedings to disseminating information over the internet, from a myriad of sources, can alter the *zeitgeist* and hasten demands for change. Absent consensus, inclusion of all recommendations, even those rejected, in the outcome document may open avenues to further investigation, scrutiny and follow-up. There is a cumulative effect that may bring states to believe interventions are not only necessary,

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<sup>307</sup> ISHR (2009) p. 41.

<sup>308</sup> Footnote A of Resolution 5/1 indicates the HRC, after conclusion of the first review cycle, may review the UPR, an “evolving process.” Also Brett (2007) p. 7.

<sup>309</sup> See Abede (2009) p. 3.

but appropriate. Consequently, the UPR effect may help states do what they otherwise would not do themselves.

At the first meeting of the CHR, Henri Laugier of the Secretariat stated, “It should be remembered, moreover, that out of these [General Assembly] debates [creating the CHR], the general impression had arisen that no violation of human rights should be covered up by the principle of national sovereignty, and that violations of the Charter in one State constituted a threat to all, and should set in motion the defense mechanisms of the international community.”<sup>310</sup> Unfortunately, the CHR failed. In 2008, the ILA’s Committee on International Human Rights Law and Practice pondered the increasing role of the individual and other non-state actors on the substance of international law, sometimes referred to as the “humanization” of international law, and asked: “Is international law changing from a state-centered system based on bilateral obligations towards a normative system reflecting the interests and values of a wider range of actors and of the international community?”<sup>311</sup> This same question may be asked of the UPR, too.

Many states embraced the idea of a review mechanism where human rights performance would be evaluated in an objective, universal, genuine and non-selective manner. Abraham believes that long term success in the UPR depends on whether it will move from cooperation to criticism when required, and censure of when called for.<sup>312</sup> If such notions are achievable in a procedural environment where states review themselves is another matter altogether. The UPR, as developed, thus far protects the mutual sovereignty interest of all states, even as they clash between themselves in a struggle of “civilization vs. toleration.”<sup>313</sup> Intergovernmental, non-confrontational, without effective accountability, the UPR is open to abuse. Politics, not law, limits its ability to fully scrutinize and monitor alleged violations of human rights in states. Among

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<sup>310</sup> E/CN.4/SR.I\* (28 January 1947) p. 2.

<sup>311</sup> ILA Report (2008) p. 66.

<sup>312</sup> Abraham (2007) p. 37.

<sup>313</sup> See Scheipers (2007) pp. 219–242.

the greatest concerns, as the UPR evolves, is to build more trust between states so scrutiny is not seen as negative on its face. It will take years, however, before the UPR can realistically be judged as an institution that fulfilled its promise.

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